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ABSTRACT

The intent of this volume is to inform boards of education about the collective negotiations process so that the board can proceed to improve board-staff relations as well as achieve its goals at the bargaining table. Although much of the information in this book applies to all public employee collective bargaining, the author chooses to focus on teachers' unions and their interaction with the negotiating team of the school board. Metzler describes the bargaining process, focusing on negotiating teams, bargaining techniques, communication during bargaining, and negotiability. The book also includes chapters on grievance procedures, mediation, strikes, arbitration, and fact-finding. A specific analysis of New Jersey labor legislation governing public employee bargaining is appended, along with the text of the New Jersey Employer-Employee Relations Act and relevant court cases. A glossary of collective bargaining terms is also included. (DS)

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NEW JERSEY
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WHAT EVERY SCHOOL BOARD MEMBER SHOULD KNOW ABOUT:

Collective Negotiations

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COLLECTIVE NEGOTIATIONS

by John H. Metzler, Ed.D.

New Jersey School Boards Association
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Introduction

One of the most frequent questions I hear is, "Isn't there some way that I can learn about labor relations and negotiations without going through it a few times?" This query, along with similar ones on other topics of vital interest to school board members, presents one of the greatest challenges to our Association: How can we help to provide the education desired by board members in a tremendous number of subject areas? This latest volume in the *What Every Board Member Should Know* series is one more attempt to meet the challenge.

Neither the author nor I would claim that all you need to know about negotiations is in this book. There are probably many points here that you did not know and which may work to keep the negotiations process from overwhelming you. In that, there is no doubt that COLLECTIVE NEGOTIATIONS will be helpful. It also offers another contribution, I think, in the ideas and attitudes it expresses. John Metzler, a highly-respected professional in public sector labor relations, constantly stresses planning, patience and analysis. The "feeling" of negotiations comes through here.

Whether you are a first-time negotiations committee member or an experienced spokesman for your board, the practical advice and mental preparation this work provides should make it a good deal easier to cope with negotiations.

Bruce Taylor
Director of Labor Relations
New Jersey School Boards Association

COLLECTIVE NEGOTIATIONS

by
JOHN H. METZLER, Ed.D

About The Author

John H. Metzler is Special Assistant for Labor Relations at New Jersey Institute of Technology (formerly Newark College of Engineering) and a member of the co-adjunct staff of the Institute of Management and Labor Relations, Rutgers University. He also heads Metzler Associates which serves as consultant to boards of education in thirteen states, the New Hampshire School Boards Association, the Association of Community College Trustees, and several municipalities and colleges.

For over eighteen years Dr. Metzler has been an arbitrator and is presently on the panels of the New Jersey State Board of Mediation, the Pennsylvania Bureau of Mediation, the American Arbitration Association and the Federal Mediation and Conciliation Services, as well as being permanent arbitrator in a number of labor-management contracts. His background also includes the negotiation of over 250 contracts with the additional responsibility for writing contractual language and processing grievances and arbitration and is included in the forthcoming issue of *Who's Who in Labor*.

Dr. Metzler, who taught for eight years in California and Pennsylvania secondary school systems, as well as fifteen years at Newark College of Engineering, has a bachelor's degree from what is now Indiana University of Pennsylvania and a master's degree from Pennsylvania State University. His doctorate is from Rutgers, The State University of New Jersey.

Dr. Metzler is the author of numerous articles on collective bargaining in education, as well as a previous New Jersey School Boards Association publication, *A Journal of Collective Negotiations*.

He is a member of the Society of Professionals in Dispute Resolution, the Industrial Relations Research Association, the International Industrial Relations Association, the American Arbitration Association, and the American Management Association, as well as Phi Delta Kappa.

Foreword

This book is intended to provide aid, and hopefully some comfort, for boards of education which become involved in negotiations with labor organizations representing either the professional or non-professional staff of the district, although it deals for the most part with the school board-teacher aspect.

At the moment of writing approximately thirty-five states grant school employees the right to negotiate collectively, including New Jersey. The New Jersey statute, passed in 1968 and under severe criticism from both employer and employee representatives, has recently been amended. Negotiations have involved almost all of the boards of education in the State.

It must be recognized that public employee negotiations is still in an almost experimental stage and all parties are under the pressure of the creation of new roles and standards. Negotiations, regardless of its rather simple appearance, is exceedingly complex and requires skill and expertise to avoid the repercussions which the process makes possible.

Although this book incorporates aspects of a "do and don't" approach, it is not a "cookbook" on negotiations. It is an attempt to be an exposition of the collective negotiations process in order that a board may utilize the process to both improve board-staff relations and retain the managerial prerogatives necessary to a management team approach to education.

The following quotation, taken from *A Journal of Negotiations*, published in 1967 makes an excellent concluding statement for this foreword:

> What occurs at the collective bargaining table? Precisely what the system ordains. If one does nothing but rail at the system he misses the opportunity to function effectively within it. Negotiations, in general, are a melange of psychology, politics and poker. Each side is accompanied to the table by power and each brings in weakness. The

> parties must be thoroughly prepared to defend their original positions—and must have a clear view of where they wish to end. . . .

The author wishes to acknowledge the contributions of various consultants associated with Metzler Associates, as well as the invaluable editorial assistance of Miss Nancy Steffen, an Instructor at the New Jersey Institute of Technology and Mrs. Judy Zients, Research Director of Metzler Associates.

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Chapter I

Legal Status of Public Employment Bargaining

The right of public employees to join unions or other similar associations is guaranteed by the first and fourteenth amendments to the Constitution of the United States. But these two amendments do not pertain to bargaining or strike rights. Nor is there any federal statute which either sets the rules or establishes guidelines for collective bargaining in the public sector. The Taft-Hartley Act, which applies to the private sector, expressly excludes public employees from its coverage. When it was first passed, it did embody provisions directly applicable to some public employees. Section 305 declared strikes by federal government employees illegal and made such strikers subject to immediate discharge. However, these punitive provisions were stricken from Taft-Hartley by an amendment that became effective August 9, 1965, leaving public sector collective bargaining in a "no-man's land" of legal ambiguity.

Recently, Congress has considered several bills that would cover public employees. One version, drafted and supported by several major public employees' organizations, was introduced unsuccessfully in the House in 1970, 1971, 1973 and again in 1974. Entitled the National Public Employee Relations Act, this proposed law is essentially an extension of Taft-Hartley to the public sector. The law would be administered by a new independent federal bureau, the National Public Employment Relations Commission, which would become the exclusive agency for regulating relationships between public employers and employees. It would thus supersede and preempt all contrary state laws and local ordinances. If, however, any state or political subdivision thereof should create a system for regulating public employer-employee relationships that is substantially equivalent to this system, the National Commission could then exempt such state or local system from its coverage. Under this proposed law employees would be granted the right not only to bargain collectively, but also to engage in other concerted activities for mutual aid or protection. Presumably, passage of this bill would guarantee to public employees the right to strike. Coincidentally, in most of the model teacher agreements being proposed by teachers' organizations, a clause is included which grants to the teachers the right to engage in concerted activities for mutual aid or protection.[1]

The basis for collective bargaining by federal employees' organizations was set by President John F. Kennedy's Executive Order 10988, promulgated in 1962. Most significant was the provision that required federal agencies to recognize all employee organizations except those asserting the right to strike. The decree also authorized granting of exclusive representation to any organization supported by the majority in an appropriate unit. It delineated the areas of permissable nogitiation, excluding wage and fringe benefits because these necessitated action by Congress. In 1969, President Richard M. Nixon promulgated Executive Order 11491 in place of 10988. Strongly criticized by leaders of employees' organizations in the Federal Service who said it was little more than half a loaf, it was substantially changed by amendments in August of 1971.[2]

Muscle and strike power, albeit patently illegal, prodded Congress in 1970 to set up a comprehensive collective bargaining structure for the United States Postal Service. Save for a lack of strike sanctions, it is patterned largely after the Taft-Hartley Act and established a model for public employees' organizations, many of whom are attempting to persuade their legislative bodies to follow suit. Significantly, although the United States Postal Service National Agreement contains a section in which the unions agree that they will not call or sanction a strike or a slow-down, there is an additional paragraph which reads: "The parties agree that the provisions of this article shall not be used in any way to defeat any current or future legal action involving the constitutionality of existing or future legislation prohibiting federal employees from engaging in strike actions. The parties further agree that the obligations undertaken in this article are in no way contingent upon the final determination of such constitutional issues."[3]

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[1] Probably, the board of education would be protected if it inserted the word "legal" before "concerted activities". In other words, if the state law provided that a strike was illegal, or if case decision provided it, then, if effect, the teachers could not take part in a strike as a concerted activity of mutual benefit because that action would not be legal.

At the present time, most existing state laws and ancillary municipal ordinances are largely patterned after Taft-Hartley. It is true that National Labor Relations Board rulings and federal court decisions concerning Taft-Hartley are not controlling in litigation affecting public employees. However, such rulings and decisions often carry weight. For example, in the wake of a 1951 Connecticut court decision, many cities, counties and school districts proceeded within their discretionary authority to recognize public employee organizations in states where such practices were not

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2. Public employers in states and municipalities and counties should take note of the managerial limitation on collective bargaining in federal agencies. A section declares that management officials retain the right to direct employees of the agency; to hire, promote, transfer, assign and retain employees as well as to suspend, demote, discharge, and take other disciplinary action; to relieve employees because of lack of work or other legitimate reasons to maintain the efficiency of the government operation entrusted to them; to determine the methods, means and personnel by which such operations are to be conducted, and to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency.

3. It is always presumed that every passage in a labor agreement is meaningful. Therefore, public employers should not agree to any similar provision, at least without first consulting legal counsel expert in constitutional questions or in labor law practice.

expressly authorized or prohibited by statute. The Connecticut court ruled, in substance, that the local school board could negotiate with the teachers' organization because there was no law barring such action.

More than 35 states, including the District of Columbia, have passed laws relating to bargaining rights in the public sector. Not all of these state statutes can be considered realistic. They range in significance from the somewhat innocuous Alabama statute of 1967 that gives municipal firemen the right to present proposals regarding salaries and other conditions of employment to the comprehensive 1970 Pennsylvania law which provides for a limited right to strike and binding arbitration of grievances. Excluded from this right to strike are guards at prisons and mental hospitals, and employees directly involved within and necessary to the functioning of the state courts. Otherwise, strikes by public employees, after exhaustion of negotiating procedures, are not prohibited unless or until such a strike creates a clear and present danger to the health, safety or welfare of the public. A 1968 Pennsylvania state law provides for compulsory arbitration when a stalemate has been reached in negotiations affecting the police and firemen. An arbitration board is empowered, in effect, to embody in a contract the terms and conditions of employment that have been disputed. Consequently, police and firemen, in Pennsylvania cannot strike, but they, and the municipality, must be bound by the arbitration board's decision as to the terms of the new contract.

The laws of New York, New Jersey[4], and Michigan have unquestionably given rise to the greatest amount of controversy and litigation. These states also have had militant, aggressive public employees' organizations which have pursued for years legislative and unilateral approaches to the bargaining problems concerning their constituencies.

The basic issue in the states and their subdivisions is who can, or who must, bargain with whom: which

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4. See appendix

public employers are required by law to negotiate with some or all of their employees. In some of the states, bargaining is mandatory only for limited groups, such as firemen or teachers. In Idaho, for instance, negotiations with firemen are mandatory, but discretionary for teachers. There are many other ambiguities in state labor legislation. There is no uniform definition of collective bargaining. Some laws merely make it mandatory for public employers to meet and confer with the organizations representing the employee groups. Others, of course, require them to sit down in what might be termed "hard-nosed negotiating". Most state laws involving public employees' bargaining rights are patterned after the Taft-Hartley Act—but not all. However, when the obligation of an employer to bargain is not specifically defined, and no definition of what is negotiable is included in a state law, public employers have good reason to rely upon and study the Taft-Hartley definitions.

Chapter II

The Negotiating Team

There are five important factors to be considered in selecting a board negotiating team:

1. the make-up of the teachers' negotiating team;
2. information necessary to the board team;
3. the philosophy of the board of education as it pertains to collective bargaining;
4. possible legal restrictions upon the selection of negotiating personnel;
5. the bargaining techniques to be used.

The make-up of the Teachers' Team

A teacher negotiating team may be composed several possible ways: an egalitarian cross-section of teachers; an elected or an appointed committee; the officers of the teachers' organization; or any combination of these. Very frequently, the teachers' organization uses as chief spokesman a representative of the state organization. Less frequently, it uses an attorney; or the local organization may conduct the negotiation itself.

Regardless of the make-up of the teachers' team or who acts as spokesman at the table, they always have ready access to, and utilize, the consulting expertise available from their state organizations. This is particularly true in devising contractual language or in establishing the variety of options which result in benefits accruing to them. The expert aids also in advising as to the procedures and techniques which the team should follow while negotiating the agreement. In many states, teachers' organizations conduct training institutes concerning methods of negotiating and responses to make to common arguments raised by the board. Very often, as a result of training and state assistance, the teachers' team may present, as demands to the board, a model agreement which is all-inclusive.

Information Necessary to the Board Team

The board team must possess all accurate statistical data available concerning the school district, including cost figures—the number of teachers on each step of the guide, various formulae for the computing of specific costs, etc. To have this information available succinctly, the team must work closely with the board's business administrator.

The negotiating team must know both the short and the long range plans of the school district and consider their possible effect upon terms and conditions of employment. As an example, in a very recent arbitration case, the board made a change in the duties to be performed by a group of teachers. The teachers took the change through the grievance procedure and then to arbitration. In its defense, the board argued it had acted on the advice of a consultant from a nearby university to eliminate one administrative position, which created the additional work which the teachers were protesting. The arbitrator took the position that the board had known at the time of negotiations that this administrator was going to be removed and had said nothing about it. Therefore, he found the board remiss and ordered it to negotiate with the teachers the impact of this extra work upon them.

In addition to understanding future staffing plans, the team should also know the age of the school buildings and have some idea of their condition. It should know the facilities that are available, the equipment that is in each school, the approximate age of the textbooks that are being used, as well as the materials that are available for the actual teaching process, and even the lounge areas available for the teachers. It should also know the system used in each building to govern hall duties, supervision of study halls and cafeterias, and, particularly, the methods of assigning personnel to these duties as they vary from school to school. The team should be familiar with each principal, his methods of management, his relationships with his teachers, and his general modus operandi.

The team must understand all the broad and subtle influences in community political life. Such influences often significantly affect negotiations in ways that are both legitimate and difficult to handle. It is important to know where the primary influence lies, particularly if it is somewhere other than directly with the board of education. The board negotiating team has the primary objective of achieving a satisfactory and successful contract. It must know which group carries the bulk of power as far as providing a majority vote by the board for approval or rejection of that contract. Boards should also be aware that a recent Public Employment Relations Commission decision held that, in certain circumstances, the board team may bind a board to a contract.[1] If that decision of the Commission is upheld in the courts, it is more critical than ever that board teams work very closely with the entire board before and during negotiations.

The board team must be aware of the implications of various contractual language. Such awareness stems from the interpretations and rulings that are normally made by arbitrators. This is crucial. The language that is devised must reflect the true intent of the parties. If it is ambiguous, and therefore unexpectedly provides a benefit to one party, that party usually makes it extremely difficult or unduly expensive to remove the offending phrase. Consequently, in writing final language or in devising tentative language at the negotiating table, the board team must be thoroughly aware of the implications of each sentence and clause. They must also be familiar with the intent and the application of the various laws, P.E.R.C., court and Commissioner of Education decisions pertaining to negotiations and education.

The Philosophy of The Board of Education as it Per-

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[1] Boards may be successful in limiting the board team's authority in advance of bargaining. The board can inform the union that its team will attempt to reach a settlement in good faith, but that the final determination of whether the board enters into a contract will rest with the board. This is very similar to the common union position that its membership must ratify a proposed agreement before the union will sign it.

tains to Collective Negotiations

The board team must recognize with absolute clarity the limits within which it is empowered by the board to negotiate. It is unwise for the negotiating team to be legislating ad hoc firm policies for the board. The negotiating team should always be certain as to how far in any particular area the board is willing to go, and it should then stay within that parameter. If the area of negotiating movement is not sufficient, it is the team's responsibility to go back to the board and discuss the matter, argue with it if necessary, and establish new parameters so that negotiations can continue.

Even if the board limits the authority of its team, the team should never place itself in the position of reaching an agreement at the negotiating table and taking that agreement back to the board, only to have it rejected. The team very quickly would lose the status it needs to function. The team should know in advance what is going to be acceptable.

But "knowing what is going to be acceptable" comes only after a series of complex questions are posed and answered. For example, what are the cost relationships in providing an education for the children of a district? How does the board determine the division of money within the budget? Does the board truly believe that the administration should manage the school, within a framework of policy devised by the board, or does the board see itself as the court of appeal for all employees? Does it look upon administration with the collegial concept of years past, or does it regard management as a board imperative?

Is the board itself aware of the vagaries of community politics—of the value, or lack of value, placed by all segments of the public upon education?

To what extent does the board move outside of itself for involvement in decision making? Does the community exhibit a continuing interest, or is it merely spasmodic?

These are but a few in a potentially lengthy series of conundrums which the team should have resolved with the board prior to entering negotiations.

Possible Legal Restrictions upon the Selection of Negotiating Personnel

There are very few states which have created legal restrictions upon the negotiating element. Two exceptions: in Pennsylvania, the negotiating law forbids any member of the same local, state, or national organization to represent management in negotiations with its own organization. In other words, if the superintendent of schools is a member of the National Education Association and a local unit of the Education Association has collective bargaining rights in his school system, that superintendent cannot negotiate for the board of education.

In the State of New York, restrictions have been placed upon the participation of board of education members in the negotiating process.

Bargaining Techniques to be Used

The board negotiating team has three very broad goals. First, it must not harm the educational process in the act of negotiating an agreement. Individual members should not relieve their own frustrations at the bargaining table in such a manner as to create strife, confusion, or strikes. The team must constantly keep in mind that the primary objective of the school system is the best education possible for the money that is being spent.

Second, the board team is charged with successfully negotiating a satisfactory agreement, one that is acceptable to both parties. It is rare that any collective bargaining agreement totally pleases any one party. Collective bargaining is merely a series of compromises. Some are palatable; others are unpalatable. Each compromise, however, should be workable within the framework of the particular school system.

Third, the agreement must never lower morale or worsen teacher-administrator relations. Hopefully, it should improve those relations. There is no question that the give-and-take of the negotiating table can create such improvement. There is no question that it can destroy it. The goal of the board team should be, at the very least, to protect the human status quo.

At The Collective Bargaining Table

To achieve these broad goals the board negotiating team must respect several specific imperatives. The first major imperative involves the maturity of the team spokesman. He must be articulate and flexible in his thinking, able to shift gears very easily in discussions, able to reject without infuriating. He must possess a very high tolerance for frustration.

A second specific imperative is a capacity to continually assess the impact of events upon the members of the opposing negotiating team. Is what is being proposed satisfactory to them? Do they truly represent a cross-section? Do they reflect what the general membership feels, or must proposals be geared directly at particular segments of that team? Do they indicate satisfaction or even joy? Somebody on the board team must be watching in order to know how the other side is reacting.

The third imperative is the accurate keeping of negotiation records. These need not be precise minutes, much less a transcript of every word that is actually said. The proceedings that are most important cover the movement that was made on each particular point that was negotiated, the date that any such movement took place, the date of tentative agreement—and, crucially, any statements uttered by either party which, in effect, defined the intent of any particular contract language or lack of language. Very frequently, an arbitration case arises in which it is necessary to go back to the record that was kept of the negotiations in order to argue the intent of particular language.

A fourth imperative is orderly communication. It must be determined who is going to communicate with the news media, the board, and all the members of the management complex. The board negotiating team cannot operate in a vacuum. It must constantly be aware that the people within its own group are concerned with what is taking place. If it is to keep a unified management front, it must facilitate communication.

The final imperative for the negotiating team is prior determination of strategy and techniques and a willingness to constantly revise positions when necessary. Very rarely is it possible to sit down at the beginning of a negotiation, determine the best procedure to follow, and find that change is not required as negotiations progress. There are any number of outside and unexpected influences which affect the actual situation while negotiating. The team, and the spokesman in particular, must be sufficiently adaptable in order to constantly meet these changing situations, to answer them and still keep negotiations moving down the path toward the final agreement.

The *board attorney* is omitted because in some cases he will already be serving as the team spokesman. If he is not the spokesman, he should be available to the team as it is reaching agreement in order to review the language of the contract. Such consultation should not be postponed until the last, however. It is disastrous to come to total agreement with the opposing team on language and then after talking to the attorney, find it necessary to change many terms which have been agreed upon.

Obviously, this model is predicated upon the concept of the management team in education. This concept requires the participation of those who aid in establishing educational goals and also, those in the school district who have the responsibility for seeing that those goals are met. Those who supervise, evaluate, and guide, comprise the management team and should, in effect, comprise the negotiating team. In addition, they have the responsibility for administering and carrying out the agreement between the parties. They must oversee the day-by-day relationship, and they must take those actions and make those decisions which might result in a grievance. If a grievance occurs, they must process it; they must answer it; and they settle it.

The Actual Selection of Team Members

If board members are involved, there should never be a majority of the board present. How can a "board" avoid making a commitment at the bargaining table when a majority are there ready to say "yes"? It may not be wise for the president of the board of education to be a member of the team. Even if he looks upon himself as merely another board member, when he makes a statement, it carries special authority.

Job titles as the key to the selection of team members are relatively unimportant. The individuals, their ability and skill, are important. Are they flexible? Can they tolerate frustration? Are they articulate? Can they accept and reflect the viewpoint of the board? Do they have the requisite knowledge? Do they have the confidence of the board? These are the important factors to keep in mind.

If the team is going to be composed of more than one person, the board must decide whether a cross-section of management is to be included. Should the team reflect the supervisors, the coordinators, the principal, the superintendent, as well as the board? Which group should be represented and why? The larger the school district, the more important it is that all elements of management be represented.

Finally, except for the general rule that a smaller team functions better than a larger team, the actual number of members is unimportant. One person is sufficient, provided that one person can perform the necessary tasks and provided that he has the necessary information and the knowledge relating to the collective bargaining process.

A Model Board Negotiation Team

Nothing in the process of negotiating takes the place of experience—of sitting there at the bargaining table time and time and time again; of being forced to recognize the feelings, the needs, the desires of the opposing group; of being forced to attempt to meld and mold them so they fit into an agreement that is satisfactory. Therefore, the membership of the team must start with a *skilled and thoroughly experienced spokesman*. The team itself must accept only one spokesman. Very rarely do dual spokesmen perform satisfactorily. Even more rarely does a team without any designated spokesman function well. The final decision within the team regarding action to be taken, movement to be made, timing, must rest with the spokesman. If the remaining team members cannot accept this process, either they or the spokesman should be replaced.

In addition to an experienced spokesman, the team should include either the *superintendent of schools*, or his closest and most trusted assistant. Depending upon the size of the district, the board should consider including *a secondary and an elementary school principal* and perhaps *a representative coordinator and supervisor*. Finally, unless the superintendent can accurately reflect the position of the board, the board should add one of its own members to the team.

With such a team, plus adequate meetings with the board prior to and during negotiations, it should rarely, if ever, be necessary to leave the negotiating table to find out whether the board will agree to a particular point. The team will never give away a managerial function that is crucial to a principal or other administrator because such administrators are members of the team itself.

The *business administrator* is omitted from the team in order to maintain his credibility. Invariably during negotiations, there are moments when the divulging of precise financial information should be temporarily evaded. Were the business administrator present during such moments, he could respond to direct financial questions only by refusing to answer or, much worse, by lying—clearly disastrous alternatives. But if the business administrator is not present, the spokesman can legitimately say, "Well I don't know the answer to that," or "I will find the answer to that," or even "To the best of my knowledge this is impossible" —and keep the process moving.

Though not an actual team member, the business administrator should work closely with the team, supplying it all requisite information. In the final hours, as the teams move toward an agreement, the business administrator should be constantly nearby—or at least at the end of a telephone.

Chapter III

Preparing For Negotiations

There are five crucial procedures which must be completed prior to entering negotiations. The board must:

1. Prepare board demands;
2. Prepare and assemble statistical information pertaining to the school district;
3. Analyze the teachers' demands;
4. List all options available to the board in reference to each of the teachers' demands;
5. Determine all board parameters and develop the negotiating strategy.

Only after the board has done its homework, is the negotiating team ready to sit down at the table.

The Preparation of Board Demands

To determine board demands, there must be administrative input. Inasmuch as the administrators are normally involved in the first line of the grievance procedure, it is important that they keep the superintendent informed about current problem areas. Is the teachers' organization complying with the time limits? Does it seem to be using aspects of the grievance procedure to harrass the administration? Are there parts of the agreement which create administrative difficulties for the principals?

This last problem merits further explanation. "Administrative difficulties" does not mean inconvenience. The management of the school must recognize that with the advent of collective bargaining it is invariably going to be inconvenienced. "Inconvenience" is completely different from the effect of contract language which may cripple the effective operation of the school.

For example, consider a contract clause which provides that teachers shall not be assigned to substitute during their preparation period. In actual practice in a school district, this might very well mean that during the first period of the day several teachers may be absent from the classroom. The administrator is faced with the problem of manning those classrooms. If he must first ask for volunteers, excess time is spent on a procedure which really should be rather minor in nature.

The school administrator who is having practical difficulties because of contract language should have the opportunity to notify the board negotiating team. In addition, if administrative practices are likely to be changed, the board negotiating team must be informed. For example, if one particular school principal plans to change the lunch hour or change the school closing time, this must be a part of the information that reaches the board negotiating team. A school administration which uses the management team concept will devise mechanisms by which administrators meet and discuss these problems and will provide for a continuous flow of information so that when negotiations begin, the administrators' perspective is adequately represented.

A second step in the preparation of board demands requires the analysis of local grievances and local arbitration awards. An analysis of grievances will often indicate where contract language is particularly good or where it might possibly be weak. At the same time, it is necessary to analyze the settlement of grievances. Even though language appears to be imprecise, if several grievances involving that language have been settled on terms favorable to the board, there is no reason to change the language. The same is true of local arbitration awards. However, if an arbitrator has issued an award based on an interpretation of contractual language which the board finds inappropriate, the board should consider making a demand which would change such language. Each arbitration case must be analyzed carefully and must rest on its own circumstances. If the grievance is idiosyncratic, unlikely to recur often, or if the award, though unpalatable, can be lived with, it might not be worthwhile making a demand but rather, change an administrative practice. On the other hand, if the award critically hinders the efficient operation of the school, then a demand must be made and successfully negotiated.

A third area for consideration in the preparation of the board demands involves direct analysis of contract language. In effect, such analysis has already been taking place in the form of administrative suggestions, analysis of local grievances, and analysis of local arbitration awards. Now, however, read the language with new eyes and test it against the present practice in each school. Is it possible that a practice has changed but that the language has not? Is it possible that a change has taken place in the school district and that language pertaining to any one specific area no longer applies? For example, if regionalization has taken place during the contract year, there might very well be language in the contract which applied when it covered a high school but is inappropriate if it now covers only elementary schools. Changes should then be demanded.

The fourth area in the preparation of board demands involves the analysis of pertinent rulings of the courts, decisions of the Commissioner of Education, the Public Employment Relations Commission, and the State Department of Education. Has anything new in these fields occurred which should cause revision of language? For example, consider this situation which occurred in an eastern state. As the negotiation season neared its end and contracts signed, the Commissioner of Education issued a ruling which affected the board's right to withhold an increment. As a consequence, the board suddenly needed contractual language establishing anew its right to withhold an increment, an embarassing position at best. Obviously, boards do not possess extra-sensory perception; but careful information-gathering and the extension of sensitive political antennae can often detect latent problems before they become manifest.

Another bit of preventive medicine involves a cagey reading of arbitration awards. If contract language is quoted in such awards and your language is the same or similar, you must then anticipate such a situation in your school district. Should you devise language in advance or should you wait for the grievance to occur? The determination obviously varies because it rests on the specific circumstances of your district and the board's relationship with the teachers' organization.

Many boards fail to face the facts of collective bargaining, fail to recognize that theirs is essentially a defensive not an offensive position. They feel it is always necessary to devise a list of demands to make upon the teachers. However, too frequently, their demands simply restate rights which they already have, and the very fact that they now demand these rights weakens their claim to them as faits accompli. As a general posture, a board should not make demands merely for the sake of making demands. It should focus all of its energies upon achieving the necessary changes in contract language indicated by administrative input, analysis of local grievances and arbitration awards, analysis of contract language, and analysis of outside rulings pertaining to contract language and refrain from the frivolous.

Assembling Statistical Information

What crucial data must a negotiator have at hand? If he is not selective, he can become so inundated with facts that they become useless. However, he must know the number of teachers on each step of the salary guide. He must know the costs of the various economic fringe benefits. The school system should have a record so that he knows the actual frequency of temporary leave days, particularly personal leave days. He should know how many of these leaves fell on the day before or the day after a holiday, the day before or after a vacation, or on a Friday or Monday. The negotiating team and its spokesman must know the estimated cost of each of the teachers' financial demands—not only demands involving direct money, but also those that involve indirect cost, such as substitutes. The business administrator should work with the negotiating team to devise a formula to aid the team in quickly computing cost based upon varieties of possible salary offers. Finally, the team should collect and prepare comparative cost data for districts in surrounding communities, including teacher salary guides.

Analysis of Teacher Demands

The board must analyze teachers' demands both collectively and each individually. Ultimately, the board must question the impact of each clause upon the efficient operation of the school and the educational process. Does it remove teachers from the classroom? Does it restrict the principal from taking immediate action when necessary? Does it downgrade the principal or the superintendent? Does it relegate the coordinators and supervisors to the sidelines in those areas in which they are specialists?

Consider several examples. A rather typical request of teachers' organizations reads as follows:

> "*If an employee requests a letter of recommendation from his administrator or supervisor, such administrator or supervisor shall write such letter, and a copy of it shall be placed in the teacher's personnel file upon the teacher's request.*"

What does this clause do? First, it takes away from the administrator or supervisor the right to refuse to write such a letter. Further, and more importantly, it inhibits the administrator or supervisor in the event he does not desire to write a letter of fawning praise.

Another frequent request reads:

> "*A grade given by a teacher shall not be changed by another person. However, in the event that a grade is challenged, and the teacher determines that he might not have known or taken into consideration all factors, the teacher has the sole right to raise or lower such grade in accordance with said factors.*"

Can the board really grant to teachers the sole authority over the grade? In most cases, the right to change the grade if necessary should rest with the administration. If the administration is willing to give up this right, then the question arises should it be given to the individual teacher? Normally the answer is no.

The board must also analyze the impact of each teacher demand upon financial resources of the school. For example, consider the frequent request that every teacher be granted a preparation period. In departmentalized situations this might be innocuous; however, in the elementary schools it could be quite costly. The key phrase is "every teacher". How many new teachers, or specialists, or teacher's aides would it be necessary to hire to provide all elementary teachers with a preparation period? Feasibility aside, there is a clear cost involved in this type of demand which must be considered. This is true whether the demand involves direct economic fringe benefits, salary, or an attempt to mandate the purchase of new equipment for the vocational department.

Options Available

General procedures for developing board options have already been suggested. Now to review some specific problem areas—beginning with an example discussed earlier: the teacher alone determines grade changes. If this is a demand, what are the options available to the board? First, of course, the board can say "no". A second position might be that no administrator shall change a grade without first discussing it with the teacher. A third position might be that no grade shall be changed without notifying the teacher.[1] A fourth position might be that a committee be formed to review all requested changes, the committee to make recommendations to the superintendent. A fifth position might be that the authority for making a change shall rest with the committee. These positions are quoted merely as random examples.

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[1] Note the differences in intent and application of the words, "notify", "discuss", and "negotiate".

However, for the board to realistically establish its parameters, it, too, must generate a variety of possible responses to each and every possible demand.

To explore option—developing further, let us analyze another possible teacher demand:

> "*During the term of this agreement, the teachers' organization may designate one official who shall have the right to leave his building and visit other buildings on teacher organization business.*"

What are the possible responses to this language? Once again, the board can simply say "no". After that, the number of possible positions becomes virtually infinite. A second option might be that such official must come from a departmentalized situation, as opposed to an elementary school; that he can leave only with the approval of his principal and can enter the school only with the approval of the second principal; that he cannot interrupt any teacher during a teaching period; that he only be permitted to use the telephone but cannot leave his building. But, which options are the best for the school district? In general, every position the board takes should promote the managerial efficiency of the school system. The principal and superintendent must be unencumbered. Among these options just discussed it might be logical to permit a teacher in a departmentalized situation to leave the building during preparation time, but not to allow an elementary teacher to leave his classroom. If direct cost is not at issue in a demand, operating efficiency is frequently the key to which the board should gear its stance.

Board Parameters

In establishling parameters, one can normally divide teacher demands into three types: demands which are primarily an attempt to establish equality with the board in decision-making processes which more properly belong to the board alone; demands which tend to restrict administrative freedom to act; and demands which involve cost.

There are demands that encompass all three types

—for example, a demand involving restriction on class size. There is a cost factor, an administrative restriction, and a definite impact upon the decision-making of the board. However, a demand that states that a child can be removed from the classroom by the teacher and cannot be returned to that classroom until the teacher agrees, involves solely an administrative restriction.

When determining parameters, the board must consider both its own position and that of the administration. In some cases, even though the board might be sympathetic to the demand of the teachers' organization, it must recognize that the demand cannot be accepted because of the administrative problems it would create. Furthermore, the board must look at its parameters in relationship to administrative action. Is the board creating a situation in which the administrator simply does not have the time to perform all the functions required of him? If it accepts a demand, must the board consider hiring additional administrators or secretaries or paraprofessionals? Is this financially feasible?

In actual practice, how does the board establish its parameters? Once the teacher demands have been analyzed, and the board demands have been established, the negotiating team must sit with the board as a whole. Each issue must be discussed in order that the team get the feel of the board's attitude.

It is likely that at this meeting, held prior to the beginning of negotiations, certain parameters will be set rather rigidly. However, most should be somewhat fluid. This is all that is necessary at this point in time. As negotiations progress, the team itself will get a better feel for the individual items that the teachers' organization regards as particularly significant and will be able to compare these with those areas in which the board feels most strongly. It is then ready to sit down once again with the full board. At this meeting, it is time to establish more precisely the parameters on most of the issues. The negotiating team should not as yet have reached the core problems. Thus, it should still have ample room to move even before the parameters are fixed.

Team Strategy

It has already been emphasized that the board negotiating team must not harm the educational process in the act of negotiating the contract. Many surveys have indicated that strikes often occur because one negotiating team misjudges the expectation level of the opposing team. Such misjudgement itself frequently arises because one side or the other is misled by either misinformation or misunderstood information. Studies in industrial relations indicate that employees tend to tell employers what the employers want to hear not necessarily what the employees actually believe. The team must be aware of the importance of peer pressure. As a rule of thumb, the negotiating team should accept as fact that the opposing team truly represents the feelings, attitudes and reactions of the members of the bargaining unit. Generally, this is a more accurate appraisal than the individual information given by one employee to one board member or principal.

Finally, the team must set up certain ground rules for its own internal operation. Each team member should know how he can move to call a caucus or how he can warn the spokesman of a possible trap, misinformation, or give him a fact which he feels the spokesman must have at that precise moment in time. Each member, particularly if the team represents a cross-section of the management, must recognize the dual role he is playing. On one hand, he is representing his own interest group within that negotiating team, and on the other, he is a negotiating team member with the goal of achieving a satisfactory agreement through the adversary process.

Chapter IV

Tactics In Negotiations

Following are a set of fourteen breezy but wise collective bargaining commandments, published in the League of California Cities periodic newsletter.[1] They apply quite well to school board negotiations.

First: "Thou shalt choose the bargaining team carefully, but there shall be only one spokesman."

Second: "Thou shalt know well the members of the other team."

Third: "Thou shalt anticipate the issues."

Fourth: "If you intend to say "No" on an issue, say "No" from the beginning. If you want something important, ask for it early."

Five: "Thou shalt not ask for what you already have."

Six: "Thou shalt not become angry unintentionally."

Seven: "Thou shalt not engage in piecemeal negotiations."

Eight: "Thou shalt attempt to trade little things for big things."

Nine: "Thou shalt keep open all channels of communications."

Ten: "Thou shalt attempt to reduce to writing what has been agreed upon."

Eleven: "Thou shalt identify thy final offer and go no further."

Twelve: "Do not agree to recommend something unless you know that the decision maker will agree."

Thirteen: "Remember that the other fellow's face is tender."

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[1] Reprinted by *LMRS Newsletter;* January 1972, Volume 3, Number 1.

Fourteen: "Thou shalt not bluff and get thy bluff called."

The language may be strained but the principles are valid and valuable. Indeed, the secret in negotiations is to interject such commandments so thoroughly that, in a crisis, following them becomes a matter of reflex action.

"Thou shalt choose the bargaining team carefully, but there shall be only one spokesman."

As the team works together at the table and becomes acquainted with each others' attitudes, the necessity of this rigid commandment diminishes. But it should be slighted only with great caution and rarely wholly abandoned. For example, if a question is asked directly to a member of the team by the opposite negotiator, the person to whom the question is asked should hold back just a second, giving his spokesman the opportunity to move in if he so desires, to cut the question off, to change a subject, or to do whatever he feels is necessary. Only if he is not hindered in this manner, should the member then go ahead and answer personally.

"Thou shalt know well the members of the other team"

"Know" what? Frankly, many very personal things: their names; what they're like as people; what their position is in their organization; where they fall on the various salary scales; what they are most interested in; their needs, ambitions and frustrations. Obviously this does not imply that the members of either side would sell out their group for something that is in their individual self-interest; however, as the pinch of negotiation approaches crunch, a compromise might be gained by slanting a proposal towards the power blocs on the opposing negotiating team.

Prescience is the virtue involved here; but, again, foresight is potentially dangerous if isolated from emotional and ideological flexibility.

Anticipate the Issues

A mature negotiator anticipates the issues and in such anticipation, begins to determine those which are the most crucial. He cannot, however, permit himself to become so polarized that he cannot shift if suddenly there are valid indications that he has been misreading the signals from the other side.

When saying "No," Say "No"

A truly important *commandment*. In the first place, the negotiator must establish trust in his credibility which stems only from his actions and his statements at the bargaining table. Credibility is obviously undermined if he hints that movement is possible but eventually gives a flat "no." If he is irrevocably committed to a certain position—hopefully a position worthy of such inflexibility—he should make his adamancy known from the start. Good faith bargaining does not require agreement on each and every issue; it merely requires an *honest* attempt to reach a total agreement.

If You Own It—Don't Ask for It

Basic philosophy for management is that it begins negotiations by owning everything and that a contract embodies only those things it has given away. If management already owns a right, it must not ask the other party to affirm that fact. If it does ask, and is rejected for any reason, it has substantially weakened any claim to that prerogative. This is a very subtle problem, and the board negotiators must be constantly aware of the implications of their requests. For example, in school board negotiations it is not unusual for principals to desire the board team to demand that teachers be at school on time or be penalized. But in fact, once the school starting time has been set, there is already an implicit requirement that all employees be on time. If they are not, the administration already has the tools to enforce punctuality. Thus this kind of demand is redundant and should be avoided.

Anger is an Expensive Luxury

This commandment, again, emphasizes the great virtue of using the professional negotiator or the outside consultant. He has no emotional involvement in the issues and, therefore, does not react defensively—a primary reason for personality clash and anger. Yet, paradoxically, it is quite important to be free to show anger at times. Anger is not only an emotion: it can also be a forceful technique, if handled cautiously. One should try not to become angry over a vital issue or with personality quirks, but only in a matter in which maximum assertiveness can win the point.

The Parts Don't Equal the Whole

In collective bargaining, if not in optics, the wider one's vision, the greater one's depth perception. Rarely, if ever, does the list of board demands equal that of the teachers' organization—nor should it. Further, the demands are divided into various categories and hierarchies. One area must be balanced against the other, utilizing the much abused concept of quid pro quo to achieve the final settlement. In effect, a negotiator begins as a juggler, handling many balls at one time. Then, at the final step, he suddenly transforms himself into a magician producing but one ball—one settlement.

The Beads—or Manhattan

This commandment simply means what it says. The only reality it ignores—unfortunately, a grim one—is that there are adamant, honest people on the other side of the table also attempting to do the same thing.

However, it does recognize the danger of the board's creating nuisance demands for ostensible bargaining purposes. The skilled teacher negotiator early on agrees to them, gradually wedging the board negotiator into a corner. Teachers' organization's nuisance demands are less worrisome; in fact, they often create unforeseen advantages. Frequently, if a series of "little things" can be grouped together, the teachers' organization may end by trading off a major issue. Thus, paradoxically, a concentration on trivia *can* be an effective technique for keeping negotiations moving so that impasse does not occur.

Communicate

A settlement is impossible if the parties aren't talking, and talking effectively. Because communication is thus so crucial and so complex, the following chapter has been set aside to discuss it in adequate detail.

Write It—Or Say It?

This commandment is debatable, but it outlines a sound procedure, as long as one keeps in mind that what is being agreed upon is a *tentative* agreement, dependent upon final acceptance of a total package which is then subject to ratification by the two bodies. When a paragraph or a clause is reduced to writing, it should contain a statement that it *is* tentative and should be signed by the two negotiators. This insures that it can be changed at a later point if necessary.

Final is Final is Final

It is very difficult to explain how one conveys the "finality" of a final offer. In negotiations, one is constantly making offers that the other party knows are going to be expanded. A negotiator should be very careful not to imply finality before he really means it. He should not be embarrassed when the other party challenges him immediately with "Well is that your final position?" or "If that's your final position, we might as well stop right now." This is usually merely a rhetorical tactic which can be dealt with by casually noting that the position is based upon the current status of negotiations, or by saying "We certainly can't think in terms of much more money than this in the face of all of the cost items that you have out here on the table. If you can reduce some of these cost items and get them out of the way, we might be in a position to do something further, but until we know what is going to happen with these items, there isn't much that we can do here."

However, when the time really comes for making the final offer, it should be stated bluntly, and there should be very little deviation from that final position in reaching a settlement. Obviously, to be effective, this action must be timely. At the beginning stages, a final offer is not only inappropriate, but probably disastrous.

In terms of money, there are three elements to a final offer: first, the sum of money the board actually wants embodied in the settlment; second, the sum of money it could make available in order to avoid a strike or plunging morale; third, the sum of money it could make available in order to end a strike. The negotiator must know in advance what each figure is. Very frequently, the amount of money that he has to work with will subtly affect the manner in which he makes his proposals to the opposing party. If the board frequently shifts its parameters, it risks disturbing attitudes at the negotiating table and creating contention.

Don't Anticipate the Decision-Makers

The negotiator should be more than the board's messenger boy. It is quite possible that the board itself is not positive where it wants to go with a particular item. In that case, the negotiator must hold back. It is not his job to establish policy for the decision-maker, but if the board is vacillating, it is not unusual for him to push it to reach a decision so that he can operate more freely.

Saving Face is not only Oriental

Or: "Remember that the other fellow's face is more tender than your own." Negotiations frequently flounder for reasons of personality. The negotiator for the employee organization must, of necessity, represent a political group. He must keep his constitutency satisfied that he is doing a good job. He may make mistakes. The board negotiator may also. Nothing is gained by sitting at the table and pinpointing the faults of the other man. Nothing is gained by making him look bad or putting him down, if for no other reason than almost inevitably the tide will shift. This is not to counsel soft-heartedness, much less a sell out—merely common consideration to better achieve that nebulous satisfactory settlement.

Negotiators Don't Bluff—or Do They?

This simply means that one should never make either an offer or a demand that one would rather not have accepted. A bluff must be backed up. Once a negotiator is flushed out of a bluff, his word is suspect, his effectiveness weakened.

The Commandments at Work

If mutual respect is lacking, suspicion and difficulty will plague negotiations and the resultant agreement. The first prerequisite for respect is knowledge. The parties should understand the past agreement, in all its nuances, and the problems that occurred in administering it. Facts must be secured; arguments organized. The parties must have skill in communicating and persuading. They must also be willing and able to listen, to really hear what the other side is saying. They have to exercise objective judgment concerning the future implications of their proposals and counter proposals. Finally, they need courage to express arguments forcefully, as well as persuasively. Most people will respect the convictions of a person who is willing and able to defend them.

The worst possibility in negotiating is the development of personality conflict. To avoid such conflict, permit the other party the opportunity to save his "tender" face when he accepts a proposal. Shun expressions of contempt and rash statements. As much as possible in the beginning of negotiations try to find the common areas of agreement, those items on which you say "yes". The "yes" habit is actually a very sound base upon which to build. Subsequent favorable accommodations will be more easily reached on dispute issues. Never make an argument in which you lack confidence. Assume that any proposal you make is going to be accepted: to anticipate rejection is to make a self-fulfilling prophesy.

One technique frequently used in negotiations might be called "forced choice." Instead of saying "Take it or leave it," one offers two subtly similar alternatives. In effect, one is attempting to ease the burden of decision-making for one's opponent—ease it to one's own advantage.

The burden of convincing usually rests with what might be termed "the moving party", the party presenting a demand; but the other party is also obliged to explain the reasons for rejecting any demand or proposal. Neither party should beg or plead nor sit at the table and say, "Well I don't know how you could ask that after all that we have done for you."

Don't be timid in pointing out the advantages of a proposal to the other party—but don't overdo it. Where benefits to either party are significant, they constitute legitimate arguments in support of a position.

The most fruitful atmosphere for reaching sound agreements is one in which both parties recognize their common interest in solving problems of mutual concern. Frequently at the bargaining table one hears, "What is the problem that is causing this demand? Can we resolve this problem?" And very frequently it might be worthwhile to say, "Well we can resolve that, we can take care of that right now. It doesn't need to go into the contract. It doesn't need to wait until next September. We can start this tomorrow."

In short, there are specific, effective negotiating techniques which both parties should learn. As actual experience in negotiations accumulates, such techniques become reflexes, a way of life. Remember, one is trying to win an agreement to live by, not merely a bar room argument.

Although one must be candid at the bargaining table the degree of candor and timing is important. As has been stated if there is a crucial demand which is going to be refused, the refusal must be made easily. However, one should avoid giving a flat "no" on every issue, particularly in the early stages. Listen to the other side as it makes its demands. Don't be afraid to let them sound off. Get them to talk it out. One is apt to learn quite a bit. When making a point, stay with it and pursue it objectively without quibbling over minor items and becoming sidetracked.

There is a trading relationship at the bargaining table. One should not concede an issue unless there is at least a possibility that the opposing party will make a concession in return. On extremely minor items, this isn't too important, but on crucial issues one must always look for an appropriate trade. One should try to group together several items: "We can do this if you will drop that, and that, and that, and that." If the other side rephrases the proposal, and if the adjustment is innocuous, accept it. One should never take a position or force the opposing party into a position that cannot be altered with dignity and grace.

One must have patience—and frankly, physical stamina. One must be willing to sit at that table as long as necessary to get the settlement that is crucial to one's point of view. When a proposal is made, one should rarely reject it outright. Study it; attempt to find something in it to accept; and, if possible, build a counterproposal upon it.

To summarize: Set a reasonable schedule for negotiating sessions. Be prepared. Keep personalities out. If the bargainers on the other side attempt to insert personality, keep cool. Use caution in making counterproposals. Don't inadvertently open the negotiability of an area that might better be kept out of the agreement. Never use the majority of the board as a negotiating team. Always retain the safety valve of having to go to the full board for approval. Don't negotiate too hurriedly. Make frequent use of caucuses. Watch for hard language such as "shall" or "must", and when there is any possible encroachment upon management prerogatives, read that language most carefully. It may be better to use "wherever possible" or similar terms which build in and retain necessary administrative flexibility. Keep legal responsibilities in mind, for these can neither be diminished nor given away. Make tentative agreement on each item, but don't finalize any agreement until there is tentative agreement on all items. Try to reach agreement at the outset on press releases and public statements during negotiations. The best practice may be to issue no individual press releases during hard bargaining but joint releases if the employee representative insists on some announcement. General comments on progress are preferable to statements on specific positions. Finally, never compromise a position in fear of an impasse, of strike, or some other threat, but compromise only because it is workable and administratively acceptable.

Remember, again, that the agreement may expire, but the relationship between the employer and the employees continues. Negotiations are here to stay.

Chapter V

Communication In The Process

"With whom are you communicating?"

The answer is: with teachers, teacher organization leaders, administrators, the public and the press, mediators and factfinders, consultants, and each other. Obviously, by using some communications media (the newspaper, for example) the message will be received by all of these groups indiscriminately. If the board wants to justify its position to the public, it must realize that the message which attempts to justify may also incite the teachers, with whom relations must continue. The message received by a mediator who is attempting to aid the parties in resolving an impasse would be different from the message conveyed to a factfinder who is going to issue a written recommendation. At any specific moment in time, the board must determine what it wants to say, to whom, when, and under what circumstances. Further, the impact upon all parties must be weighed.

"Why are you communicating?"

To educate, to mislead, and to propagandize. Each of these has a distinct purpose during collective negotiations, but there is another motive—self-satisfaction—which is rarely justified or of value. It frequently is used by the board member adamantly opposed to the concept of negotiations, who becomes indignant and even ill when confronted with the necessity of sitting and talking rationally with teacher representatives, and who then issues statements satisfying his own feelings of frustration and opposition. It is also used by the teacher negotiator who has discovered the equality of the bargaining table and cannot restrain his abuse.

"How are you communicating?"

Communication through the written and verbal word is obvious, but the communication that occurs through attitude and expression is often overlooked. When negotiating face to face, when talking in informal or chance meetings, or when expressing ourselves through press releases or letters to the employees, we tend to become careless about revealing our attitudes. And yet, a strong case can be made that attitude has the greatest impact in situations we are discussing.

"When are you communicating?"

All the time, intentionally or unintentionally. Communication is not only the written or oral word, but also the failure to be on time for a meeting, the tardy and ill-timed caucus, the facial expression.

"What are you communicating?"

Possibly the most important of the five, this question is essentially unanswerable. Communication is dependent upon many factors, most of which the party sending the message cannot control, or frequently, does not even consider. There are certain normal barriers to communication which must constantly be overcome, and which affect what is communicated:

We hear what we expect to hear.
We have different perceptions.
We evaluate the source of the communication differently.
We ignore information that conflicts with what we already know.
Words mean different things to different people.
Words have symbolic meanings.
Our emotional state conditions what we hear.
We don't know how the other person perceives the situation.

Consider the following hypothetical situation: The teachers in a district are determined to sit down with the board to discuss a formal negotiating procedure. Their officers include several relatively new teachers, an elementary teacher with no dependents who has been in the system for 20-odd years, and a disgruntled math teacher from the high school who feels he should have been selected as department chairman. In the past, benevolent paternalism has prevailed, and the board has always had the glowing feeling which comes from performing a voluntary service to the community while at the same time doing "everything humanly possible" for the teachers. The board members are business and professional people, anti-union by inclination, and shocked that the teachers are both dissatisfied and militantly insistent upon pressing their demands. The teachers have issued public statements, which are irresponsible and unprofessional from the viewpoint of the board. The press has picked up the possibility of trouble and has been running a daily story about the situation in the local schools, while the parents have begun calling the principal. What are the possibilities for communicating with the teachers?

Obviously, a meeting can be held, attended by all the teachers, in order that the administrators or board can speak directly with them. This, however, is "going over the heads" of the leaders of the teachers' organization. This may very well be illegal under the unfair practice section of the current public labor law in New Jersey. Suppose for the moment, however, that it is not illegal. What message is being communicated to the leaders of the teacher's organization? What message is being communicated to the leaders by this action? That they are considered unimportant? That the board wants to split the members from the leaders? Since the board refuses to meet with the elected representatives, will not these leaders immediately attempt to instill a more militant and cohesive spirit among the teachers in order to maintain their role as leaders?

If the meeting is held, should the press be excluded? What can the press then tell its readers, among whom are the teachers, if its source of information is second-hand? Will the board's press release be as widely reported, and as favorably, as the press release of the teacher's organization?

If the meeting is held, will all the board members be present? If they are not, will this imply that the meeting isn't really important? Who will speak for the board? Will its speaker begin by justifying past actions and benevolencies? Will he castigate the teachers for their show of ingratitude? If the teachers are determined to have collective representation, will such a meeting merely create a situation in which the board will eventually be *forced* to meet with organizational leaders, thereby losing considerable psychological advantage.

Now consider a formal confrontation between the board and the teacher organization leaders. The same communication problems arise, but now the board's message to the teachers will be filtered through the organization's leaders. The message to the public will be by press release and filtered through the news media. In such a meeting, words are important, but actions, attitude and general psychological climate are even more so. After the teachers have spent several weeks in preparation for, and in anticipation of this meeting, what is the effect if the board is late? If the board president abruptly jumps to his feet at 10:45 p.m. and says, "Well, that's all for tonight. Call the superintendent, and we'll *try* to set another meeting before the budget is passed."—What is he communicating?

Has the board exhibited a sincere concern for good board-staff relations within this new context of collective representation, or has it really indicated that as long as the teachers insist upon collective representation there will be a fight to the death? Has the disgruntled math teacher been reinforced in his beliefs that the board not only makes poor decisions, but also frequently works against achievement of quality education? Has the elementary teacher, with over 20 years experience and no dependents, become so frightened that she returns to tell the others, "They are harsh and vindictive—we'd better forget this." Or is her message, "They are harsh and vindictive—we must band together even more strongly, or we are all lost."

Obviously, "communication" is an endlessly subtle process, further complicated by peculiarities within school boards.

Communication Problems Within the Board

The board of education may be split itself, may lack time for negotiating, and of course it lacks the profit motive which spurs parties to reach an agreement so much more effectively than the motive of public service. There may be political forces at work within a board; members may be up for re-election and need support from elements of the community to accomplish this. And, of course, a school board has no boss in the industrial sense. In industry, when the boss eventually says, "This is what we are going to do," everybody falls into line. The tugging and pulling within the decision-making apparatus stops. With a board of education, however, such a statement is frequently merely the signal for really beginning the tugging and pulling. Board members, all equals by law, jealously guard that equality and assert themselves on an individual basis with predictable regularity.

Moreover, communication does not occur in a vacuum. There is usually someone or some group communicating to the same people with whom the board is concerned, who is actively working in opposition to the board. They might be members of the teachers organization, individual teachers—disgruntled or not—or that portion of the public which opposes individual board members, higher taxes, integration, or what have you. The free press, legitimately in search of news concerning the public and the taxpayers, must investigate and report upon what it finds. Schools are in the public domain, and the news about them is usually of greater importance than news about most local industrial disputes. All these pressures complicate communication.

Legal Restrictions

In addition, there may be legal factors which affect communication. Any law mandating or permitting collective negotiations will, as does the New Jersey statute, probably create certain restrictions. For example, New Jersey law:

(1) Provides the teachers with the right to organize and to bargain collectively;
(2) Provides for the establishment of a state agency to administer the law and carry out its provisions;
(3) Provides for the means of securing recognition, either by election or card-check;
(4) Determines the proper subject matter for negotiation;
(5) Provides a means of resolving an impasse in negotiations through a combination of mediation and fact-finding; and
(6) Provides for the signing of a written agreement achieved by good faith bargaining.

How does such a law restrict communication? In the first place, the law insists that the teachers have the right to organize without interference, intimidation, coercion or restraint. In other words, the board would be breaking the law if it aided or approved one organization over another, or if it wrote letters which threatened the teachers should they join either organization or the wrong one. The board which suddenly discovers the value of communicating with the teachers at the same time that the teachers suddenly discover the value of a militant organization, will undoubtedly be suspect. Furthermore, because good faith bargaining is required by law, the board which attempts to appeal—on bargainable issues—to the teachers over the heads of their elected representatives might very easily be found not to be bargaining in good faith.

Finally, regardless of law, there are some obvious common sense restrictions a board should place upon itself. Once the teachers have selected their representatives, it is absurd to enter into a popularity contest with them. The board will invariably lose, and relations will be strained. Careless words, phrases, press releases, and the like whether they come from the official board spokesman or the recalcitrant board member whom nobody can quiet, will come back to haunt the proceedings, possibly for years to come. Expect this kind of situation and prepare for it. Recognize that collective negotiations, and communication during the process, can be used to enhance the board cause, to build staff morale, and to create better board-staff relationships. Use it for this purpose rather than for personal satisfaction.

Summary

Robert Luse, former Associate Executive Director of the New Jersey School Boards Association has written an article,[1] "Communications During Negotiations," which succinctly provides guidelines to a school board. A few excerpts follow:

(a) Negotiations, like disasters and other crises or emergencies, may create a highly charged news atmosphere. Therefore, special pre-planning of communications is particularly vital.

(b) Every effort should be made to avoid having individual board members of the negotiating team issue ill-considered statements on their own in the heat of the debate.

(c) One person who thoroughly understands the issues should serve as the board's press representative.

(d) Remember that internal communications can play a large role during negotiations; therefore, since board communications during negotiations will be viewed by teachers as propaganda, in some degree, the dissemination of the board's story should start well in advance of negotiations as a part of the continuing communication problem.

(e) Maximum publicity value should be gained from the settlement, its worth, and key concessions to the teacher's advantage.

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[1] *School Board Notes*, New Jersey State Federation of District Boards of Education, April, 1967.

Chapter VI

Negotiability

Either party has equal right to assert what is negotiable. Under most state laws, an agency exists which, in the event the parties cannot agree about negotiability, will reach a determination. If no such agency exists, or if it does not have the authority the courts will do the job. Usually the matter is resolved by the teachers' organization bringing an unfair practice charge against the board on the basis that the board is refusing to negotiate.

The question of negotiability varies from state to state. The Pennsylvania law specifies certain items as negotiable and others as items upon which the board must meet and discuss with the teachers' organization. Most state laws are not so explicit. The New Jersey statute, first passed and signed in 1968, is fairly typical. It provides that the majority representative of the employees and the designated representative of the public employer must negotiate in good faith with respect to "terms and conditions of employment." What these "terms and conditions" embrace is not specified.

In New Jersey[1], the law now expressly vests in its Public Employment Relations Commission the power to decide what are negotiable items. However, such decisions are appealable to the courts.

Prior to the passage of the 1974 Amendments, the New Jersey Supreme Court ruled that the consolidation of departmental chairmanships and the school calendar are non-negotiable but that hours of work and compensation are. The Court opinion stated that "the lines between the negotiable and non-negotiable will often be shadowy." Further, the opinion emphasized that if the issue is educational policy, it can neither be negotiated nor arbitrated[2]. These decisions may very well not be precedent setting in the future, and boards will require expert guidance to avoid being found guilty of a refusal to bargain allegation.

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[1] Chapter XIII deals extensively with New Jersey.

The generally accepted concepts of negotiability are applied to the issues which follow, as well as managerial concepts and the need to operate the schools as efficiently as possible.

The Witnesseth Clause

A teachers' organization's proposed agreement frequently begins with a long "Witnesseth" clause. In effect, it discusses what is good education and what the board and the teachers believe and are attempting to do. Such a clause should *not* be included in a negotiated instrument. Remember that in negotiating and devising language one must anticipate eventual arbitration. Any aspect of the contract including a "Witnesseth" clause, is grist for the arbitrator in his attempt to decide proper meaning and intent of ambiguous contract language.

The Recognition Clause

One of the first articles normally proposed is entitled "Recognition". The employer has the same right as the teachers' organization to insist upon the proper negotiation unit. Thus, if the board desires to exclude any supervisory, professional, non-supervisory or nonprofessional personnel from the teachers' negotiating unit, such personnel should be specifically excluded by the listing of titles. There seems little justification for including those persons who properly should be in management: assistant principals, principals, administrative assistants, supervisors and coordinators. The position of department chairman, always somewhat ambiguous, is sometimes included with management and other times with the teachers. In addition to the managerial group, there seems little reason to include in the teachers' unit substitutes, personnel who are on a per diem basis, or those who "are to be employed by the Board", simply because they are not yet employees. Problems arise if summer school personnel are included, unless there is also a phrase reserving the board's right to determine whether such a program should operate and, if so, what type of staffing to provide for it. At the very least, supervisors should be separate from those they supervise.[3] In public employment collective bargaining, it may be better to have a plethora of bargaining units rather than a minimum.

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[2] GERR (No. 535) December 31, 1973, pp. G.1-G.4

A Successor Agreement

Normally, the teachers' organization will demand the negotiation of a successor agreement. All that is important here is to provide a deadline for the presentation of demands and also to provide a period of time in which those demands can be analyzed, clarified and costed, with a subsequent date for the beginning of negotiations. At the time of publication, the Public Employment Relations Commission had adopted a timetable for negotiations designed to assist boards and unions to reach an agreement on contracts by February 1 of each year. Boards and unions may find PERC's timetable to be a sufficient deadline for the opening of negotiations. One should not agree to language that allows negotiations to be reopened later if a grant is received from a Federal or State agency or if there is an unexpected increase in state aid. In fact, one should insert a clause which states explicitly that once negotiations are finished, they are finished until the agreed-upon reopening period.

Teachers' Rights

This is always a difficult article to negotiate because few people really wish to take away the "rights" of a teacher. However, the community and the students also have rights which must not be neglected. Many teacher "rights" are a matter of law, but proceed carefully. If the teachers are citing a law, one should ask for a precise quotation, not merely a paraphrase—and if included, it should specify that it is included only for the purposes of information, not arbitration. After all, if a group or an individual breaks the law, there is recourse to the courts; and if there is recourse to the courts, it should not be an arbitrable matter.

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[3] Chapter 123, Laws of New Jersey, 1974 provides that such supervisors cannot be included in a unit accepting non-supervisory personnel. As contracts expire such supervisors may be required to form a separate unit.

Just Cause

Teachers' organizations often demand a clause that states that "no teacher shall be disciplined or reprimanded, reduced in rank or compensation or deprived of any professional advantage or given an adverse evaluation of his professional services without just cause." It is important to anticipate the problems such a clause could create once taken before an arbitrator. It is rather easy to determine if somebody has been disciplined or reprimanded for just cause, but what of the other conditions? For example, what are the "just" reasons for determining a reduction in rank or compensation? For that matter, what is meant by "rank"? What is included in the concept of a "professional advantage"? Is it possible such language could be expanded to mean the utilization of equipment, the use of a desk, or a parking space that has been taken away for some particular reason? The phrase "an adverse evaluation," while somewhat ambiguous, could result in professional judgment being subject to arbitration. Obviously, if such language is agreed upon, it is crucial that the administration, and in some cases the board, determine early and clearly the standards applicable and apply them consistently.

Association Rights and Privileges

Negotiations often begin in this area with a demand that a wide variety of information be turned over to the teachers' organization—information which may not even be kept in a statistical manner, but which would have to be culled from many different sources. Ostensibly any information in the public domain should be turned over to the employee organization; however, one should try to discourage fishing expeditions, which cost time, effort, and money.

"Association rights and privileges" can also cover such items as released time for meetings. The consequences of such a demand may be unacceptable since the administrator, losing an experienced teacher for a period of time, must find a substitute, and the students may suffer from the discontinuity of having a variety of teachers.

There may be questions involving the use of school buildings. Should the teachers have the right to use a school building at any time, merely by notifying the principal? Common sense tells us "no", that the administration must control the school building. The administration, in retaining this authority is, in effect, retaining it for the board of education. Ultimately, it is board policy that should determine who can use the building and under what circumstance.

Teachers invariably demand paid released time for some official or officials of the association. This, again, means a substitute in the classroom, and it costs the board additional money as well. Moreover, as the demands are made year after year, "released time" tends to expand. Today it is no longer merely released time for the association president; it is also released time for representatives in each building, released time for committees to work on association matters, released time to meet with the principal. And at each step, the financial costs increase—as does the utilization of substitutes, resulting in less, rather than more, classroom expertise.

"Sub Contracting"

A recent demand upon the scene is a request for contractual language which would prohibit a board of education from entering into a contract, without the express written approval of the teachers' organization, which would result in instruction being provided, supervised or otherwise influenced by any person or persons, organization, group, or company other than properly certificated persons directly employed by the board. In industrial unionism, the phrase is "no-subcontracting". Again, it is inconceivable that a board should consider so limiting itself. From a practical managerial point of view, the proviso is moot. It would be quite difficult to impose any such "subcontracting" arrangement upon a group of teachers if they were adamantly opposed to it. However, the *right* of the board to "subcontract" should not be prohibited.

The School Day

The board may be required to negotiate the length of the work day, but it should not be necessary for it to agree to specific times for the start and end of that day. If the board does agree to insert teaching hours, this clause should specify either the total number of hours required per day or the total number of hours required per week. When determining the beginning and ending time, the board must carefully insure that student bussing and related activities are adequately and safely supervised. This is a crucial responsibility of the board. If teachers are not going to perform those particular tasks, the board must hire others to do so. Therefore, before contractual language is written which frees the teacher from such obligations, the board must be positive that it has the funds to provide the necessary coverage. Similarly, if the board agrees that teachers may leave the buildings without permission during any portion of the school day, either lunch or unassigned periods, specific provisions must be made to insure that school property, children and their activities are not left unsupervised.

Teachers also often demand a restriction upon the number of meetings they are required to attend after the regular student school hours and the payment of additional compensation for such attendance. But, if the board is going to agree to negotiate such attendance, it must be positive that it isn't negotiating a blanket restriction and should specify exclusions from such restrictions. It must not forget the potential desirability of teacher attendance at such functions as PTA meetings and programs presented by the students, and other related school-community affairs.

Preparation Time

The usual demand means preparation time for everybody: nurses, guidance counselors, specialists, and elementary teachers, as well as those teachers in a departmentalized situation. This is not necessarily objectionable, but the language of such a clause must be carefully worded. For example, if a clause merely states that all teachers shall receive a minimum of thirty minutes preparation time each day, that's precisely what it means—*all* teachers. If the board does not mean to include elementary teachers, it must then specify those excluded.

Extra-Curricular Activities

Invariably the teachers' organizations demand that the extra-curricular activities be on a voluntary basis and, furthermore, that all who participate be paid. Many of these activities are compensated. However, if the extra-curricular activity is considered an essential and integral part of the educational program, the board and administration must retain the flexibility to assign personnel if none who are qualified volunteer.

Again, from a managerial point of view, one recognizes a volunteer will probably more enthusiastically perform a task than a draftee. But a vital program must not depend upon voluntary service. If nobody volunteers, the administration must have a right to assign personnel to those programs it or the board deems desirable.

Teacher-Student Ratio

Class size, in and of itself, is probably not a mandatory subject for negotiation. However, the impact of class size may be. Consequently, one is apt to find oneself negotiating in this area under one guise or another. Many factors controlling class size cannot be resolved by collective bargaining. If a board should decide to negotiate this item and thereby agree to a contractual statement regarding class size, such a statement should be designed so as to give the board necessary flexibility in the ultimate decision. No agreement should restrict the school district from experimenting with various teaching techniques that might require large or small classes or the use of educational television or computer technology. No maximum number of pupils per teacher should be specified. Despite a great many studies, no one has yet defined optimum class size. The literature and the research are ambiguous. Most teachers seem to believe there is little or no proof. Therefore, even from an educational point of view, flexibility to experiment and to utilize resources available to the school district should be built into the agreement.

Hiring of Personnel

It is only prudent that the board retain the freedom to hire those persons which the state law permits it to hire. Moreover, the board should not make a prior commitment on the number of specialists or the number of substitutes it needs. Again, it must have the flexibility to reduce this number if the financial conditions require or if appropriate substitutes or specialists cannot be found.

Teachers often demand that the number of specialists presently employed not be reduced during the term of the agreement. Perhaps this is educationally sound, yet awkward situations can occur. Once this language is in the contract, it is very difficult to reverse. Although legally the contract expires upon a certain date, it would become difficult to reduce the number of specialists in a new negotiation.

Non-Teaching Duties

Such duties are probably negotiable, considered a term or condition of employment, but the people doing the negotiating, the teachers' organization, should only be permitted to negotiate for the members of its bargaining unit. In other words, the teachers may agree to perform such duties or agree not to perform them. But they must not be allowed to dictate board hiring policies for non-teaching functions. If some non-teaching duties can be eliminated, and the board so desires, it should not be restricted by the contract to hire unnecessary personnel. The board should make every effort to retain the right of its administrators, principals, and superintendent to assign such duties and responsibilities to the teachers as they determine necessary to the efficient operation of the schools in order to accomplish the goal of the best education possible. The board should also retain the right to determine whether or not certain classroom activities, for example collections for charity, should be barred.

Teacher Assignment and Transfer

The basic determination of teaching assignments, voluntary transfers, and reassignments must rest with the administration and should neither be delegated nor restricted by prior agreement.

However, certain procedural matters may be more negotiable; for example, the furnishing of lists of open assignments or related schedules. The board should discuss such possibilities with the superintendent to determine administrative feasibility before reaching agreement. In general, the board should distinguish rather precisely between basic decision-making and procedure. It is quite easy to negotiate mechanical procedure, but the board must be careful that in meeting a procedural requirement it does not lose the right to make final determinations in these areas.

Promotion

Normally, a promotion demand is all-encompassing. It first defines what constitutes a promotion; it then attempts to establish the specific criteria which should be considered for promotion; and finally, it spells out the mechanical procedures, the method of processing applications, posting jobs, notifying personnel of appointment or non-appointment. The board should insist that the definition specifies that extra work and/or extra pay assignments do not constitute promotions. Other than this, the question of increased salary or the salary differential is not particularly vital to the definition itself. The mechanical procedures should be simplified as much as possible. For example, there should be no requirement that the superintendent acknowledge in writing the receipt of a request for a promotion.

It is merely enough that some acknowledgement be made, such as filling in a form. There is no need for a mechanical requirement that a continuous file be kept or that this file be checked and rechecked every time a promotional opportunity arises. If a vacancy occurs, a new application should be made, regardless of the number of times any particular person has applied in the past.

It is the function of the superintendent and the board to determine the qualifications required for any promotion. This should be stated with unequivocable clarity. If qualifications are listed, they should be designated as the *minimal* qualifications only. The administration must retain the right to change, modify, or add to the qualifications that are necessary for any position, and it must be free to exercise this right as necessary. It should not be required to notify the teachers' organizations in advance of changes in the qualifications for various positions in the district.

The promotion clause should not be written in such a manner that only presently employed personnel are eligible for promotion. A promotion should be considered a vacancy, a vacancy which can be filled internally or externally by a new hire. In many cases, the infusion of new blood into a school system is desirable and necessary and, in itself, must be retained as a legitimate promotion criterion.

Part-time Programs

These are areas such as evening school, summer school, home-teaching and special federal programs. Inasmuch as it is often necessary to fill positions in these areas by hiring outside personnel, it is far better if such programs can be excluded from the contract. If they are included as a negotiable item, the most that the board should do is to provide a mechanism whereby persons who are interested in these positions can make application for them. There should be no guarantee or implication that full-time staff has an automatic right to these jobs.

Teacher Evaluation

Teacher evaluation requires a great deal of discussion because it involves a conflict between good management practice and an adversary relationship as it effects contract negotiations. It may well be a good management practice to have teacher input into the determination of the criteria for teacher evaluation. If the employees have the opportunity to help shape an evaluation form, they may find it more acceptable than if the form were merely dictated to them. But managerial practice pales if the teachers are able to say, "We have *the right* to negotiate teacher evaluation criteria and if we cannot agree, we have the right to take the issue to an arbitrator who will tell us how personnel should be evaluated." Basically, the board as management must affirm its responsibility to establish the basis for teacher evaluations. The format of the evaluation form, the frequency of evaluations, the identity of the evaluators, and the professional judgment involved—these are areas which should not be turned over to an arbitrator. Ironically, it is quite possible that input from the teachers' organization would be very helpful in evaluation procedures. But, unfortunately, the adversary relationship of negotiations may force the board to insist upon a rather inflexible position.

Methods of evaluation have changed over the years, and at different points in time there have been different methods used, different criteria, different research findings. If the evaluation system is spelled out in the contract, it becomes hard to change. Obviously, if, as a teacher, one has been evaluated for ten or fifteen years satisfactorily the teacher will be most hesitant to accept a change in that evaluation procedure which might result in a lower evaluation. Consequently, the board itself must retain the freedom and the flexibility to change the evaluation method if it is not performing its function.

The teachers' organization may demand that the supervisory personnel who do the evaluating must sit down to discuss their evaluation with the teacher involved. This is another matter that makes a management negotiator almost feel that he is arguing against motherhood. Since good supervisory practice mandates a discussion between the teacher and his immediate supervisor concerning these reports, it is difficult to insist that one will not agree in advance that such discussions must take place. However, in the event the procedure agreed upon was not followed, the evaluation and any subsequent action might be vacated by the Commissioner or an arbitrator. This problem must be kept in mind when any procedure is negotiated into the contract.

Fair Dismissal Procedure

As a demand, fair dismissal procedure applies primarily to the non-tenured teacher. Obviously, the impact of such a demand will vary from state to state and in accordance with the increasingly frequent judicial decisions made in reference to the right of a non-tenured teacher to due process and a fair hearing. In the State of New Jersey, for example, the courts have been rather adamant in insisting that the non-tenured teacher who is not rehired does not have the right to a hearing. The recent *Donaldson* court decision does guarantee non-tenured personnel a statement of reasons. A recent Commissioner's decision also indicates that the teacher should be provided an informal appearance before the board. In other states, rulings have been different. Consequently, the reaction to a fair procedure demand will be colored by the law prevailing at the time. I t would appear that where the courts have determined that a non-tenured teacher does have a right to due process, the grievance procedure, up to and including the board of education, might very well constitute due process.

However, if the non-tenured teacher is permitted to grieve and arbitrate the question of his rehiring, the arbitrator may acquire the power to determine tenure. This is a critical responsibility, one which, in many states, the board cannot delegate. Consequently, if language is going to be written in reference to a fair dismissal policy, then it is very important that the role of the arbitrator be carefully delineated.

Complaint Procedure

Probably because complaints against teachers have had serious repercussions in the past few years, the teachers' organization often demands an article which it terms a "complaint procedure." For example:

> *"Any complaints regarding a teacher made to any member of the administration by any parent, student or other person which does or may influence the evaluation of a teacher shall be processed according to procedure outlined below."*

Obviously, almost every complaint falls somewhere within this definition. In many cases, complaints are minor in nature and are disregarded. At the same time, a series of disregarded complaints can have a cumulative effect and eventually become serious. Consequently, it is very difficult to know which complaint does or may influence evaluation. Normally, the article attempts to establish some sort of a procedure for dealing with specific complaints, including the right to confront the party making the complaint. At this point, the board must anticipate who is apt to make such a complaint. What about students? Should there be an open adversary confrontation between the teachers' organization and a student or parent? There should be no question that the teacher should have the full right to grieve any action taken by the administration as a result of a complaint. This is an entirely different matter. At the same time, the contract negotiators must be careful that they are not establishing two or three types of grievance procedures. As difficult as it is, language can be devised for a complaint procedure which is fully protective of the rights of the teacher and at same time fully protective of the need for efficient operation of the school system.

Teacher-Administration Liaison Committee

This article establishes councils in every building and also a council that meets with the superintendent. There is nothing wrong with such councils if the subject matter they discuss is restricted. The grievance procedure—not ad hoc councils—is the mechanism by which the administration of the contract is policed. Council meetings should not be used to determine the settlement of a grievance. In a building council, the question of building practices and policies is certainly a fair subject for discussion. However, particularly in a larger school district, the administration must be aware of the need for a unified, consistent approach to a variety of matters covered by the contract. Therefore, the building principal must be cautious that he does not weaken a position or a right of the other building administrators in these meetings.

In a council meeting with the superintendent, district problems and practices are proper topics. But, once again, the administration of the contract agreement should not be discussed, otherwise the council merely becomes a continuous collective bargaining session.

Instructional Council

The negotiators must insure that the instructional council can neither become a "second administration" nor by-pass the administrator's relationship to the board of education. The instructional council should research, study and make recommendations. It should be advisory in nature.

The instructional council can be a great aid to a school system. However, it should have no right to appeal to an arbitrator if the board rejects its recommendations.

Leaves

Teachers may make a whole series of proposals concerning a variety of leaves of absences: sick leaves, temporary leaves, extended leaves, and sabbatical leaves to name but a few. Negotiating the question of granting leave poses four questions: the cost of the particular leave; whether or not approval is necessary for the particular leave requested and upon what basis approval should be given; in what position in the school district, and on what point in the salary guide will a returning teacher be placed; and what scheduling difficulties will the particular leave present to the administration. Other than sick leave, all requests for leave should be made by application to the superintendent and subject to his approval, unless the board specifically provides otherwise. Currently, most extended leaves are without pay; but in the future, teachers may start to demand some percentage of salary for even these leaves.

It is debatable whether a teacher should be required to return to the district periodically if he has been granted a paid or partially paid extended leave. Guidelines here are unique to each district and the customs of the profession and must be negotiated in that light. But the board does have the responsibility to protect the school district from unnessary cost and to protect the administration from being hamstrung in scheduling and assigning teachers.

Professional Development and Educational Improvement

In this section of the proposed agreement, the teachers' organization normally lists many different items for which it feels the board should pay as an aid to the professional development of teachers. However, it also frequently proposes that a committee of teachers be established to act upon requests from other teachers for authorization to attend courses, workshops, seminars and so forth. But, obviously, if the board is putting up the money, the superintendent—not the teachers—must approve each application. Money for teacher education can be a very valid expenditure if the board and the school system receive a direct benefit.

Maintenance of Classroom Control and Discipline

The teachers' organization argues that each instructor have final authority to decide which students may and which students may not attend class. Such a demand is patently unrealistic. Many states restrict the right of any school system employee to make such a decision and provide strong legal support and protection for the students involved. The board must retain ultimate responsibility for the maintenance and control of discipline in the classroom. This is not a responsibility that can be delegated to committees and should not be negotiated. Committees can provide advice and propose procedures, but the board or superintendent must make the final decision on suspension or expulsion within the parameters of state law.

Personal and Academic Freedom

The teachers' organization invariably insists that the personal life of the teacher is not an appropriate concern of the board except as it may directly prevent the teacher from performing properly his assigned functions during the workday. The problem with this concept is that both communities and court decisions differ about the relevance of various facets of a teacher's personal life to the educational process. While the board obviously does not want to deprive a teacher of any of his individual legal rights, a "personal freedom" clause in a contract is inappropriate. If possible, the board should reject the article in its totality, indicating simply that it will follow the existing law to protect individual rights and the pursuit of academic freedom. Actually, the board will probably have a strong interest in the personal life of a teacher as it might bear upon his suitability for teaching in that district: alcoholism, drug use or blatant immorality might be legitimate areas for board concern.

Instructional Materials

The teachers' organization frequently demands that the teachers, and only the teachers, select books and other instructional materials and supplies. But again, state law often mandates the board of education make such decisions. Good management practice indicates that teachers should be influentially involved in textbook selection. However, contract language should clearly reserve the final decision for the board of education, even if no state law pertains.

Board Demands

Actually, the board need make very few demands. Most negotiators believe that, at the least, a board should demand and secure a "board rights" clause, one that clearly protects its rights. However, there is no reason why the board should not be able to demand and secure a clause barring illegal strike activities or similar job actions during the contract year. In addition, the parties should be able to agree upon a clause in which they pledge to follow the grievance procedure outlined in the agreement, and only that procedure, until it is exhausted. Beyond these three clauses, the board need only demand language which rectifies previous errors or permits a change made necessary by new conditions.

Any discussion of negotiability reminds us that collective bargaining is an adversary process. However, the ideal relationship between the parties is best expressed by quoting from a recent court opinion:

> *It would seem evident that, when dealing in fields with which the teachers are significantly concerned though outside the fields of mandatory negotiation, the end of peaceful labor relations will generally be furthered by some measure of timely voluntary discussion between the school administration and the representatives of its teachers even though the ultimate decisions are to be made by the Board in the exercise of its exclusive educational prerogatives.*[4]

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[4] Dunellen Board of Education and Commissioner of Education of New Jersey v. Dunellen Education Association and Public Employment Relations Commission. Supreme Court of New Jersey (No. A-5-September Term 1973)

Chapter VII

Grievance Procedure

The grievance procedure is the most vital element in any contract. Its purpose is to provide a mechanism by which the employee organization may police the contract and is based upon the concept that the contract belongs to the employee organization which also has the responsibility to see that the contract is followed.

The grievance procedure is both used and abused. It can be used to test the contract to determine precisely the meaning of a certain phrase, or it can be used to harrass either an individual supervisor or the employer himself. It is not uncommon to find it used because of internal political problems in the employee organization or as a softening process prior to negotiations. Regardless, the grievance procedure is an assertion of equality, a reemphasis of the fact that collective bargaining does take place between two equal parties and that the employee organization functions as contract policeman.

There are six vital elements in a grievance procedure:

a) the definition of a grievance;
b) the statute of limitations;
c) the time limits at each step;
d) the appeal procedure;
e) the limitations upon the right of appeal;
f) the limitations upon the arbitrator

The Definition of a Grievance

There are any number of abstract grievances. But in actual practice, a grievance is only that which is precisely defined as a grievance within each contract. Such a definition can be as all-inclusive or exclusive as the two parties want. If state law defines grievance then the matter is settled. From the employer's point of view, the better definition is a statement that a grievance is a claim by an employee that he has suffered harm or injury by the interpretation, application or violation of the terms of the agreement. This definition limits the grievance strictly to the terms of the agreement. At the other extreme, is a clause which, in effect, defines a grievance as something which, by its removal, makes somebody feel better.

Statute of Limitations

The statute of limitations is the section of the procedure which gives the employee who believes he has a grievance a limited time period in which to begin processing it. If there is no time period specified, the limitation can only be interpreted as a reasonable period of time, whatever that might be. An arbitrator's determination of "reasonable" would undoubtedly rest upon many factors. The most common statute of limitations reads as follows: "A grievance to be considered under this procedure must be initiated in writing within fifteen calendar days from the time when the grievant knew, or should have known, of its occurrence." It is also quite common to find a grievance procedure that excludes the phrase "or should have known of its occurrence". In that case, the grievance must be initiated within the stated number of days from the time it actually occurred. Note also, the reference to calendar days. It is not important whether the specification is calendar days or workdays, but it is very important that the type of day be defined.

It is worth noting that arbitrators are loath to settle a grievance on a technicality. Consequently, if exceeding the time limit is intended to waive the grievance, it is best if the contract so states.

Time Limit at Each Step

These are time limits upon the grievant in processing his grievance to the next step, as well as time limits upon the person receiving the grievance in providing his response. For example, the agreement might state that the employee grievant, no later than five school days after receipt of the decision of his principal, may appeal the decision to the superintendent of schools and that the superintendent shall attempt to resolve the matter as quickly as possible, but within a period not to exceed ten school days from the receipt of the appeal. While it is important that the grievance move through the procedure as rapidly as possible, those people involved in each step who must search out information, determine the issues and reach a decision must have time to perform their function. Therefore, the time limits usually must be lengthened progressively at each step.

Appeal Procedure

An appeal procedure is common in industry and is becoming more common in the public employment field.

The following procedure can be used to secure the services of an arbitrator. Typical contract language might read:

1. Either party may request the selected agency (usually a state agency or the American Arbitration Association) to submit a roster of persons qualified to function as an arbitrator in the dispute in question.
2. Within five calendar days, if the parties are unable to determine a mutually satisfactory arbitrator from the submitted list, either may request the selected agency to submit a second roster of names.
3. Within ten calendar days of receipt of the second request for arbitrators, if the parties are still unable to determine a mutually satisfactory arbitrator, either party may request the selected agency to designate an arbitrator.

Item 3 is quite important. As long as the two parties are attempting mutually to select an arbitrator, there is always the possibility that one or the other, as a tactical move, will refuse to come to an agreement. The process of arbitration does resolve disputes. It resolves them without the flare-up of strikes and wildcat confrontations. Consequently, if the process is to function, a mechanism must be provided to insure that the procedure will not be stopped merely because the parties fail, intentionally or otherwise, to come to an agreement upon the arbitrator.

Potential arbitrators can be approached directly by the parties or they can be selected by utilizing the services of an appropriate agency. Assume that there is an appeal procedure functioning. There are several agencies from which the arbitrator can be selected, among them, the Federal Mediation and Conciliation Service. This agency of the Federal government has provided both mediation services and arbitration services in school board affairs in those states in which there is no state agency. A second source could be whatever agency, if any, is established by the state for public employment. In some cases, this is the state labor board; in others, such as New Jersey, it is a totally separate agency. The third source is the nation-wide, non-profit American Arbitration Association. It has panels of arbitrators who are experienced in all aspects of public employment, school board affairs, and industrial employment.

Limitations of the Right of Appeal

Many different limitations can be placed upon the right of appeal, and they can be inserted in almost any section of the grievance procedure. For example, there can be a limit upon the subject matter which may go to arbitration. Such a limitation might be stated within the grievance procedure itself or within the body of the contract. The following limitations are among the most common:

a) the failure to renew the contract of a probationary (non-tenured) teacher;

b) the failure to renew the "extra contract" of any employee in jobs such as department chairman, coach, club advisor, etc.;

c) subject matter over which the board has no authority or may not delegate;

d) subject matter for which another forum is specifically provided by law.

The right of appeal should be limited to the terms and conditions of the agreement, if for no other reason than the fact that the arbitrator is created by the contract. As a creature of the contract, he should contemplate only the terms that are actually written into the contract for his interpretation.

Limitations Upon the Arbitrator

It is quite important that the arbitrator be limited by contract language. He should have neither the power to establish a new contract nor to go beyond the framework of the agreement. Consequently, the most common limitation reads as follows: "The arbitrator shall limit himself to the issues submitted to him and shall consider nothing else. He can add nothing to nor subtract anything from the agreement between the parties or any policy of the board of education."

Arbitration—Pro and Con

Two basic questions remain: Should there be arbitration of grievances at all? And, if so, should it be advisory or binding? Some people argue against arbitration, citing the public character of the educational process. Final appeals, they reason, should rest with the public representatives or the commissioner of education.

Others argue for arbitration, saying that there is little difference between the educational "industry" and any other and that a knowledgeable, impartial, judicial investigation and judgment are crucial to settling disputes. If one could amass the statistics necessary to make a study, the results would probably show that no more "bad" decisions are made by arbitrators than are made by the courts or the various commissioners of education.

Usually it is not necessary to specify within the grievance procedure that the employee who brings a grievance must continue to follow the orders of his supervisors. The majority of arbitrators would agree.

To Analyze Your Grievance Procedure

Write out the existing definition of grievance and analyze exactly what it says. Normally, when a contract is interpreted by an arbitrator, he relies on clear, unambiguous language. He does not read a particular clause and say, "Gosh, you made a mistake; I'm going to correct this for you." Nor does he say, "It was unfair of the other party to force you to sign this; therefore I'll relieve you of it." You negotiated it, you agreed upon it, you signed it; therefore, you're stuck with it.

Again: A precise definition acts to restrict grievance processing and to prevent it from becoming negotiation. No grievance procedure should be written so that a teacher can grieve on behalf of the students. He should be able to grieve only on behalf of himself. He should be permitted to grieve only because he has suffered an injury or harm or inconvenience. In analyzing the definition, consider whether it is necessary or wise at a future negotiation to attempt to change it.

Analyze each step of the local grievance procedure. Is there really a statute of limitations? An amazing number of contracts omit this crucial clause or make it so lengthy that it becomes meaningless.

The board should also analyze the contract to isolate those articles from which the majority of grievances will probably stem. In general, there are five types of administrative action or inaction which may generate grievances:

1. Capricious, discriminatory, unreasonable action;
2. Changed working conditions;
3. Improper assignment of duties;
4. Failure to follow agreed upon procedures;

5. Failure to establish/follow criteria

Capricious, Discriminatory, Unreasonable Action

Two examples:

1. A superintendent refuses to approve a personal leave day or refuses to approve a particular educational course, the expense of which a teacher wants to be reinbursed.
2. A principal who assigns a teacher to substitute for another during his free or preparation period.

In both cases, the administrator must be ready to prove that he has not acted capriciously but has merely made a judgment based on careful consideration of the facts and current policy.

Changed Working Conditions

Such a grievance may arise if there is a clause exempting teachers from performing a certain duty—or a clause that prohibits changing the working conditions for the life of the agreement. For example, a music teacher had been teaching five days a week in one school. A new school opened, and some students were transferred. Hence, the teacher had to be in the second school one day a week and in the first school four days a week. The teachers' organization brought a grievance action citing a contract clause guaranteeing that none of the terms or conditions negotiated could be changed. The arbitrator determined that such a change did not alter the teacher's conditions of employment.

Improper Assignment of Duties

Again this relates to contract language. What flexibility does the contract provide the principal or superintendent to assign duties? Is there a clause which specifies that an individual can be assigned only to an area in which he is certified or competent? Can the superintendent exercise judgment in assigning a teacher?

Regarding such assignments as supervising buses, cafeterias and study halls: Is there a clause which specifically prevents a principal from assigning teachers to such duties? Read the contract and isolate every clause that relates to the assignment of a duty.

Failure to Follow the Agreed-Upon Procedures

In a recent arbitration case, the contract clause specified both that by a certain date all non-tenured teachers would be notified whether they were to be reemployed or not and that each teacher would be evaluated twice during a school year. For some reason, the school board failed to notify them by the specified date and the administration failed to make the required number of evaluations. At a later date, within the same school year, six teachers were notified that they were not to be reemployed. They processed the matter to arbitration, solely on the question of failure to follow procedures. The arbitrator agreed with the teachers. However, he took the position that he could not require the board to grant tenure to any of these teachers. Therefore, those teachers who would have received tenure did not need to be rehired; however, the board was required to pay them the difference between the salary they would have earned if they had been rehired and any amount of money they earned during the following year. Those teachers who would not have acquired tenure by being rehired had to be retained another year.

Failure to Follow and/or Establish Criteria

If there is a portion of the contract which states that a certain matter will occur, subject to the approval of the superintendent, the superintendent would be wise to establish general standards guiding his action. If the standards are listed in the agreement, such as a clause which states that applicants for promotion will be considered according to their years of service in the school district, certification and evaluation records, the decision-makers must be ready to show that they did follow the criteria, that they did give consideration in each area to each individual who did apply, and that they did this consistently.

Chapter VIII

The Impasse in Public Employment Bargaining: Mediation[1]

It's almost a cliche to say that avoiding an impasse should be the chief objective of negotiators. But impasses do occur, even when good faith prevails. Experienced negotiators, as they first begin modifying their proposals and counter-proposals, are often able to judge the likelihood of an ultimate impasse by gauging the attitudes expressed at the table and the intensity with which particular positions are taken.

What does one look for as the opening moves are being made? What has the union promised its members? Certain promises or expectations cannot be kept secret. Is the union committed to ask for the moon? Has it publicly declared its intent to call a strike if it doesn't get most of what is included in its set of "must" demands? What is the union's negotiating history? But don't be swayed by the negotiating history of the national union. In terms of a strike call, the local union is much more important. What about the public employer's own posture? What is the pattern of settlement with other unions with which it has negotiated? Will it capitulate under the threat of a walk-out?

These are the kinds of questions to which both employer and employee must address themselves before getting down to the chore of settlement. If their estimates are correct, if they are convinced that their adversaries genuinely want to settle a contract on a fair basis, the chances of a labor impasse are measurably reduced.

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[1] P.E.R.C. has recently adopted a timetable for negotiations which, in effect, creates an impasse after 30 days of bargaining. According to these rules, which can be changed at any time, (and if the timetable is adhered to by P.E.R.C.) a mediator will be assigned by the Commission *whether or not either party requests one* 30 days after the start of bargaining. Under the rules, 30 days after the assignment of a mediator, a factfinder will be assigned. Therefore, it may be difficult in the future for Boards to affect the timing of mediation and factfinding.

If either the past history of the parties or their diagnosis of the problems facing them suggest that the negotiations will end in mediation, most negotiators tend to hold back on their proposals and counter-proposals. They believe it wise to leave some issues for a mediator to resolve. If the opposition is determined not to settle prior to mediation, they may believe they benefit by having the mediator nudge and shove them into accepting proposals which they would have accepted anyhow.

Function of the Mediator

A primary function of the mediator is to provide suggestions and advice. Note that word "advice". The advice of the professional mediator is valuable, but it need not be accepted. Attempt to read between the lines. Experienced mediators have been through the mill. Their advice may seem unpalatable. It may remain unpalatable. Yet the mediator's advice, partisan or prejudiced as it may appear to be at first, may contain a hidden clue to resolution of an otherwise seemingly insoluble dispute. Don't be overly concerned if a mediator has a trade union background or a management background. The experience which mediators have acquired in negotiations for either side is the fund upon which they draw to develop creative approaches to settlement. They are going to make a determined effort to find a common ground for settlement. If they can't provide common ground, they can give professional advice and make suggestions as to how the dispute can be settled. The charge placed upon mediators by the agency employing them is to resolve the dispute, hopefully short of strike.

The mediator's usual first ploy is to have a free flowing discussion in a joint session with both bargaining teams. If they want to be angry and pound the table, he lets them do it, usually remaining quite impassive. He then might separate the parties, meeting privately with one team and later, the other. "What is really bugging you?" he asks. "What have they been advocating for trading purposes and what are the real 'musts'? Are they willing to compromise on any of their supposed 'musts'? Are they aware of the chances they are taking in letting a dubiously defendable issue go to fact-finding?"

The mediator knows that fact-finding is a dirty word to some management negotiators and many union negotiators. Since his task is to promote a settlement, he might find it useful to say a few unkind or frightening words about fact-finders. Actually in another impasse situation, he might very well be the fact-finder assigned after a mediation effort proved unsuccessful. It matters little. He ordinarily tries to convince both negotiating teams that they should choose the known over the unknown, and the big unknown in the mediation process is the nature of the potential fact-finder. What values will he have? What criteria will he use in evaluating the facts presented to him? What recommendation will he make?

An experienced mediator may seek a private off-the-record meeting with one of the members of a negotiating team. This frequently occurs if there seems to be a division among the members or if he knows or trusts one more than the others. He will decide who carries the most weight, then "accidentally" run into that person at the drinking fountain or while getting a cup of coffee or in the rest room. Such private sessions can be successful only if the mediator and conferees have confidence in each other's integrity. What they say in confidence must be kept in confidence. Given confidence, private talks do work—in labor negotiations, just as they did at the peace talks in Paris, or more recently, the Middle East. In Paris, weekly meetings were window dressing; the real settlements were achieved in the secret sessions.

Never put a mediator in the position of seeming to violate confidential disclosures. Keep in mind that he must always walk a tightrope between the parties. He can't reveal to the other side what has been told to him in confidence, but, at the same time, you may want him to intimate to the other side those areas in which you are willing to concede or compromise. Tell him. But don't irrevocably commit your team to a proposition in a confidential discussion with a mediator. If you do, don't blame him for leaking it and urging its acceptance by your adversaries.

After exploring issues in private conferences, the mediator frequently urges a resumption of direct negotiations. He may prod one team or the other to state publicly what they have been saying to him privately. It is quite alright to make this disclosure, and it is quite alright to make it contingent upon the opposing team's accepting some point or removing something from the bargaining table. The skillful mediator won't begin with your end position but will explore every avenue in open session that might catalyze a resolution. If a mediator's advice has been rejected, in part or in toto, he may still feel impelled to present specific recommendations to the parties. These may stem from his own concept of what it will take to break a deadlock or from his experienced intuition as to that which will be acceptable to both parties.

The Mediator is Not an Arbitrator

Remember that the mediator is not an arbitrator with the authority to impose a settlement upon the parties. He recommends but cannot mandate. In some states, the mediator's recommendations, if rejected, cannot even be alluded to or given any weight in a fact-finding procedure. But his recommendations are not to be blithely ignored. He usually has good reason to believe that one side or the other will find them generally acceptable. He may be convinced that what he openly proposes would constitute a fair and equitable solution for the issues in dispute. If he proposes a contract clause supporting a demand of the other side, this doesn't connote lack of impartiality. It does reflect his considered judgment that the clause he recommends has merit. At worst, the mediator's recommendations may simply reveal to each party how far they are apart. At the very least, they suggest possibilities for narrowing disputed issues or eliminating them altogether.

Chapter IX

The Impasse In Collective Bargaining In Public Employment: Fact-Finding

In public employment, when mediation ends, when it fails to produce settlement, fact-finding commences. Fact-finding is almost unknown as a device for facilitating settlement in private sector negotiations. It is used only in those very large disputes that may harm the health and welfare of the nation, which come under the terms of the Taft-Hartley Act, which provides that the President may make use of fact-finding.

A decision to proceed to fact-finding may be irrevocable. Hence, premature decision can be counterproductive. Study your own position before finally breaking off relations with the mediator. Which of his recommendations, if disclosed to the public, would gain widespread support? Which would tend to strengthen the opposition's hand? What could be accepted without forfeiting any essential right or prerogative? Remember, the mediator is constrained by the dictates of confidentiality from revealing all that he knows about the ultimate position of the other side. His hints often reveal more than his outright recommendations.

In addition, one must calculate the cost of preparing and presenting a case to a fact-finder. Each issue must be researched, and the more issues that are involved, the higher the cost of preparation. At the same time, if a truly important principal is involved, one must go to fact-finding regardless of cost.

No one can predict in advance the findings and recommendations of a fact-finder. He is free to pick and choose among the arguments and the evidence laid before him.

One must be cautious and not rely too much upon previous actions of fact-finders, because they, like arbitrators, need not be consistent. They may adhere to precedents established by previous fact-finding awards or they may not. They may also find any number of reasons for deviating from principles espoused in other cases. The circumstances, in their opinion, may differ, or the value of one criteria as opposed to another may vary. For example, ability to pay may be the crucial factor in the current dispute, even though in the prior case it was considered virtually irrelevant.

Fact-finding stems from the process of arbitration. There are two types of arbitration: the arbitration of rights and the arbitration of interests. The arbitration of rights is most common as a part of the grievance procedure. Arbitration of interests, very rarely used in industry, resolves issues to be included in a new contract.

In the private sector, "binding" arbitration is most often used to resolve a grievance. In other words, during negotiations the parties voluntarily agree to arbitrate any dispute that they cannot resolve and are bound by the findings of the arbitrator. But once public employees began organizing, negotiating, and using arbitration, the concept of advisory arbitration gained favor, if only because the concept of state sovereignty did not permit an arbitrator to issue a binding edict. The term "advisory arbitration" is now used in the arbitration of interests as well. For example, the State of Connecticut calls for "arbitration" of contract disputes, but then describes a process which is known as "fact-finding" in New Jersey. Some seven states, as well as a few cities, provide for mandatory binding arbitration of contract disputes involving police and firemen.[1]

"Fact-find" is the determination of interest, and is, theoretically, the final step in the negotiating process in the public sector. The process requires first the reaching of an impasse, mediation, and then a request for fact-finding or an agreement among the parties for fact-finding. After fact-finding, there is usually no other legally required step except for the voluntary continuance of the process of collective bargaining by the parties. A few states permit a limited strike if the fact-finding process has been completed and if one or both parties rejects the fact-finder's recommendation.

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[1] For a discussion of various forms of interest arbitration in public employment, see *The Case for Fair and Final Offer Arbitration*, New Jersey School Boards Association, Trenton, April, 1975.

Usually, agreement will be reached after all aspects of the law have been applied: face to face negotiations, mediation, and fact-finding. However, if everything fails and no agreement is reached, the board should consider continuing its current policies and procedures. It should adopt a salary guide, fix a school calendar, determine the hours of work, hire teachers, assign teachers, and carry out is function. The laws mandating negotiation do not mandate agreement. The teachers' organization can, of course, resort to illegal means to get a contract, and any board entering negotiations should have a strike plan prepared. The fact-finder's recommendations should carry a great deal of weight and can place enormous pressure on either or both of the parties to reach agreement. It is the intent of the law that the fact-finder's recommendations be the basis for agreement or continued negotiation.

The fact-finder must be a neutral third party of respected stature who is experienced and knowledgeable, who will evoke the facts of the dispute and judge the validity of each party's position. He may also arrive at a recommendation which differs from both positions and which, in his judgment, is fair, equitable and responsible. Fact-finding is not an integral part of collective bargaining but it is an aid, an outside pressure to move the parties to voluntary agreement. Fact-finding, in public employment, is a substitute for the pressure invoked by a strike or any disruption of work by stoppages, sanctions, absenteeism, etc. It may not, however, preclude such actions. Obviously, if the teachers' organizations feels that fact-finding will not support its position, the threat of fact-finding may push it in another direction.

Well before the fact-finding hearing, the board should have begun to prepare exhibits, charts, graphs, data and documents. The board's position on the open issues should reflect its last negotiating stance taken with the teachers' organization, on economic issues as well as contract language. Any agreements reached up to this point by direct negotiations should be retained, subject to full and final agreement on all issues. Those proposals made in mediation may or may not pertain in fact-finding. Perhaps the parties will agree to permit the fact-finder to act as a mediator and attempt to resolve their differences accordingly or perhaps during the hearing. The fact-finder, after getting a feel for the issues and positions of the parties, will ask for a recess and make suggestions for a settlement.

The possibility of mediation and fact-finding tends to make boards more conservative in negotiations. The teachers' organization, likewise, often feels that mediation and fact-finding may further reduce its position, and therefore, tends to hold rigidly to its demands. Or perhaps both parties feel they can get *more* in mediation and fact-finding than in direct negotiations. All these possibilities exist, and must be carefully considered prior to negotiations in developing a consistent strategy.

To be successful in fact-finding, one must have been farsighted in negotiations. Fact-finders and mediators assume that there is always something left to give: more money or more language. Hence, one's back is really to the wall if one has squandered all one's bargaining resources at the table.

Since fact-finders take into account cost of living, ability to pay and make comparisons with other districts, one must be prepared to argue one's position in terms of these relative standards as well as in terms of simple merit.

It is important to remember that there are no legislated standards for fact-finding. The burden of proof rests with the party who has made the proposal. The teachers' organization should be required to make the initial presentation on those issues it proposed that created an impasses. The board should then try to refute its arguments. For example, one district was in mediation over money and other contract provisions. The first mediation session resembled fact-finding. The mediator asked each party to give him its position on the issues while the other party was present. The first issue was money. The teachers' organization presented its salary guide, and the mediator asked two questions: "How much of an increase have comparative districts agreed to?" After the first question, there was silence, the shuffling of papers, and finally a rough estimate was given. The response to the second question was the request for a caucus. The board had not yet presented any justification at all for its own position. But the teachers' organization, due to its inability to present evidence in its behalf, had lost considerable credibility with the mediator, a loss which ultimately worked to the board's advantage in reaching agreement on open issues. Ultimately, however, one can depend only upon one's own preparation—not upon the possible lack of preparation by the adversary.

Preparing for Fact-finding: The Basic Steps

(1) Determine the issues.
(2) Gather all pertinent data relating to each issue.
(3) Determine the basic board position on each issue.
(4) Analyze thoroughly existing contract or policies for the past three to five years. Prepare exhibits to clearly demonstrate each position.
(5) Analyze the teacher organization's position and arguments on each issue. These should be apparent from negotiations and mediation. Prepare arguments to refute its position—to show it to be unfounded, unreasonable, capricious, unnecessary, non-negotiable or illegal.
(6) Determine the relative strength and weakness of the board's position and the employees' position on each issue.
(7) Determine strategy to compensate for their strengths and your weaknesses.
(8) Organize your information, facts, documents, exhibits and testimonies into a positive and thorough presentation with built-in flexibility. For example, you may prepare exhibits anticipating arguments and then never hear these arguments.

In that case, don't open Pandora's box. In your own research you may discover some information which weakens your position. Discard it—but be prepared for the employees' organization to use it against you. Anticipate the arguments the teachers' organization may make.

Exhibits

The purpose of an exhibit is two-fold: either to substantiate one's own position or to refute the position of the adversary. Consider one area: the preparation of salary arguments. What documentation is apt to help you? First would be the effect of the guide structure on actual salaries paid to teachers. Analyze the number of steps on the guide, the number of degrees on the guide, and the amount of the increments. Then prepare a history of guide changes and improvements—actual dollar increase and percent of increase. It would be valuable to show the cost effect of increasing longevity and of course, to compare one's own guide to those used in comparable districts.

To document your fringe benefits proposal, it is necessary to break down the benefit package: the sick leave provisions, temporary leaves of absence, extended leaves of absence, and all the variety of insurances. One might prepare exhibits on class size and teaching load, comparing the cost of teachers per pupil within your school district to the cost in other school districts. Finally, one should prepare data on the ability to pay and the cost of living. And remember, a simple statement is not sufficient: the sources of all information must be noted on each exhibit.

There are many other board exhibits that might be valuable. For example, the proposed salary guide might be charted to show the increase at each step. Or one might select a sample of teachers and demonstrate the increases they've received over the past three to five years.

Concluding Arguments

Once you have prepared your documents, have introduced them into evidence, have attempted to refute the documents offered by the teachers' organization—it then is time for concluding arguments. As an example, consider the following concluding statement made by a board advocate in a recent fact-finding hearing:

> *"During the course of the fact-finding hearings, the teachers' organization presented twenty exhibits, most of which were devoted to showing comparisons of this district to other districts, in an effort to convince the fact-finder of the reasonableness of the teachers' organization position and the unreasonableness and inadequacies of the board's final offer of settlement. However, at no time during these hearings did the teachers' organization precisely indicate what relative position it feels that this district should be when compared to these other districts for the year 1973-74 as related to its proposals on the salary guide, instructional bonuses, coaching bonuses, and employee dependent coverage for health insurance. The only clear argument made by the teachers' organization, throughout, was that the board offer was not enough.*
>
> *The board, however, demonstrated by a careful analysis and presentation of exhibits relating to the teacher organization's comparison of other districts that the final offer of settlement made by the board maintained the same or better relative position for this district for 1973-74. The one specific area which was indicated in the comparisons both by the board and the teachers' organization was the relative position of the BA maximum to the other districts. As we pointed out in our analysis, the board, recognizing this area of concern by the teachers' organization, in its offer provided for a $1,000 increase at the maximum step and also increased the increments in dollars throughout the guide both of which are very major*

improvements in the guide.

The BA maximum offered by the board is the highest guide increase reported in those schools compared by the teachers' organization. The average increase per teacher is also the highest reported for the 1973-74 year of the districts compared by the teachers' organization. The overall contract terms and conditions and fringe benefits as compared to the other districts clearly indicate that this district is providing an excellent benefit program for its employees which includes the best pupil teacher ratio of regional districts in the county, a very reasonable and equitable teacher load. It is the only school district that provides both the tuition reimbursement program and a sabbatical leave program, and in the non-economic area the board has tentatively agreed to several language revisions as requested by the teachers' organization, including a provision for binding arbitration.

Overall the board has proposed a settlement to the teachers' organization which amounts to approximately a quarter of a million dollars in its cost, the most significant expense of which is a 9-1/2% increase in teachers' salaries. The board submits that on the basis of all the evidence, testimony and exhibits that the board's final offer to the teachers' organization should be accepted by the fact-finder as an equitable and reasonable offer of settlement, and that he recommend in his findings that this offer be accepted by the teachers' organization for a one-year contract."

The Brief

The concluding arguments made, the board should request time to prepare and present a brief. This should enlarge upon the concluding arguments and include reproductions, where appropriate, of all board exhibits. Only include employee's organization exhibits if they can be refuted.

After both parties have had all the time necessary to present their case to the fact-finder at the formal hearings and submit their briefs, he prepares his report and recommendations upon each issue submitted. Occasionally, he will remand a specific issue to the parties for further negotiation, refusing to make a recommendation upon it. Initially, his award is usually presented for private consideration by both parties. After a short period, a few days if the recommendations are not accepted by both parties, they may be made public. More often than not, direct negotiations are resumed. In some states, another super fact-finding panel may hold further hearings.

In summary, experience suggests that neither mediation nor fact-finding in themselves can absolutely prevent illegal strikes. But mediation has produced contract settlements more often than not. So has fact-finding. Occasionally, political interference may work to undercut mediators and fact-finders. Political pressure is often more persuasive than dispassionate, objective logic. In general, however, the statutory processes of mediation and fact-finding have worked remarkably well.

Chapter X

The Impasse In Collective Bargaining In Public Employment: Strike

In almost all cases, strikes are illegal for public employees. But strikes do occur. The problem is not how to punish these people for breaking the law; it is how to operate the schools, how to resolve the strike, how to get back to the table, and how to get settlement in the face of the problems that emanate from a strike.

Money is mixed into virtually every strike. But there may be other forces at work as well. There might be an impasse over a critical matter of principle. The board might perceive an issue as a crucial problem of managerial prerogative whereas the employees' organization might be vitally concerned with security and protection, regardless of managerial prerogative. Strikes most often occur because negotiators have become inflexible, have carelessly painted themselves into a corner. In any case, regardless of the reason for strikes, the fact that they can occur makes it necessary to have a strike plan, and it is necessary to develop that plan in advance rather than waiting for the last minute to begin preparing it for tomorrow morning's strike.

Developing a Strike Plan

Legal Problems

Faced with a strike, the first legal question is securing an injunction. In some states, the board is required to move immediately. In other states, such as Pennsylvania, the injunction can only be secured after other conditions have been met. In any case, it is obvious that the advice of the board attorney is crucial. Experienced negotiators tend to believe that one should *not* move quickly towards the injunctive process, particularly if the strike begins on a Thursday or a Friday. In this event, the negotiator might suggest waiting until Monday or even Tuesday to seek an injunction: the schools will be disrupted for only one or two days, and there is the whole week-end for negotiations.[1]

It is not necessarily good, nor productive, for the community to penalize those who disregard the injunction, who go to jail and yet are, in effect, good citizens. They are the teachers of the children of the community. If the negotiator can avoid all that by successfully negotiating a conclusion to a strike prior to any need for an injunction, this he would rather do. At the same time it can only be restated that the board must follow the guidance of its attorney as to the rapidity with which it must secure an injunction.

A second legal problem involves school financial aid. Who has the power to cut off school aid, and what point? Under what circumstances is it apt to be cut off? Can the school year be shorter than is legally required? The answers to these and other questions should be known in advance. What would happen if the board were to close down the schools when a strike begins—a lockout? Is there any problem paying people who are willing to work but who are locked out? Are there problems stemming from the board's legal responsibility to provide an education? In all of these areas, the attorney's opinion must be sought and followed.

Non-Legal Problems:

First, and most crucially, where do the principals stand? What is the administrator's role during a strike? Is he a part of management? At this point you learn very quickly that it's not sufficient merely to say to a principal, "Obviously you are part of management"—particularly if he has not previously been made to feel a part of management. If he has felt that he has been part of the important decision-making in that school system—if he's felt himself to be a unit within a management team comprised of principals and vice-principals, superintendent and even the board—then he is going to be much more responsive to the problems of the board during a strike.

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[1] In addition to a court, it now appears possible to secure an injunction against a strike from the Public Employment Relations Commission. As of this writing, P.E.R.C. issues injunctions in unfair practice matters. The board, seeking an injunction, would file a "failure to bargain in good faith" charge against the striking union and request the Commission to enjoin the strike or threatened strike.

Second, who will man the schools? What percentage of the teachers are going to report? To which schools? You should be taking readings on this very early during negotiations, trying to determine if the teachers are fully in support of their negotiating team. But don't be overly-optimistic. Peer group pressure is hard to resist, and even teachers who oppose the strike may stay out of school in deference to their colleagues. Be conservative in your estimate of available teachers.

Are there substitutes available? Either professionals or people within the community who feel a duty to keep the schools open and will aid in supervising the children? Perhaps parents or service group members will volunteer. Decide for each building how best to handle large numbers of students with small numbers of teachers. What provisions can be made? Can classes operate? Will auditorium-size lectures work? Can older students profitably run group discussions with younger students? Are there educational films in the library? How should the available teachers be distributed? Should the emphasis be placed upon continuing the education of the seniors and the primary grades? And of course, back-up plans have to be made in the event that you contemplate early closing of the schools.

The teachers will charge that the board is doing nothing but baby-sitting—nothing but running a movie theatre. They will charge insufficient supervision, unsafe conditions. Adequate planning will not prevent these charges. They will probably be made regardless. But adequate planning will make it possible for the school system to operate openly, permitting the press to see what is taking place.

Third, who is going to be the spokesman for the school system? There is nothing worse than having everybody running off helter-skelter, creating controversy by responding to the pressure of public questions. The board and the administration should decide quite early who is going to be the spokesman, how he is going to secure information, and who is going to function as the central clearing agency for the mass of rumors that take place during a strike. Who will answer the questions of parents who telephone in each day? Each school system must resolve these problems for itself.

Fourth, how are you going to communicate internally? How would you communicate if your switchboard suddenly went dead? How can you get in touch with all of your principals quickly and efficiently at any particular moment? Who should telephone whom? How do you transmit the latest information concerning the status of negotiations, the status of the strike? Is there a central number for the principals to call if they feel the need for assistance and guidance during the course of the day or evening? You should have answers to each of these questions long before you ever need them. Maintaining a clear line of communication between administration, principals and board is crucial to the system's capacity to function.

Fifth, what is the role of the board? This role will vary from district to district, depending upon how active a particular board was within the negotiating process itself. In any case, it should not come as a surprise to any member of the management team—particularly the board—that a strike has occurred. And, of course, the greater the role the board has played in preparing the strike plan, the more aware it will be of its proper position during the strike.

Sixth, how can the strike be resolved? How can we get back to the bargaining table? What posture will the board of education take? A common posture is: "We refuse to talk with our disloyal employees who are on strike." Yet, it there is a militant employee organization that is widely supported by the teachers, how *do* you get them back? In the old days, management tried to starve the union back to work. But, in this case, who are you going to starve, when you also have the legal responsibility to provide an education?

If the teachers' organization is weak or badly organized or has many members who want to keep a certain status within the community, it *might* work simply to say, "We're not going to talk until you come back to work." But deciding on such a stance is hazardous and requires a subtle feel for the personalities involved. The negotiator should never make a statement which makes it seem the board is later backing down when, even though the teachers are on strike, the board is sitting down and bargaining.

At this point in a strike, a professional mediator is invaluable. Unfortunately, particularly in public employment strikes, many people with political or public ambition attempt to get involved, and this isn't the place for an amateur. It's a very difficult and delicate situation, and one can only try to secure a reliable and experienced mediator.

One learns rather quickly that public utterances are a poor barometer of public reaction. The public attitude is frequently difficult to assess. The public is diverse and diffuse, and, unfortunately, those people who talk to board members are apt to be those who already support the board's position. Is the community itself divided? Will political leaders and would-be leaders promote divisiveness within the school system? These are problems not necessarily unique to large urban centers.

Summary

Now to summarize the proper administrative response to a strike. First, the impasse occurs. Thus, the first step in instituting the strike plan takes place at the negotiating table when it becomes obvious that a possible breakdown in negotiations is imminent. This merely involves an assessment of the situation. The more experienced one is, the more accurate the assessment should be. The Public Relations Director should attend every negotiating session from this point on. If the school system does not have a Public Relations Director then, as indicated earlier, somebody should have been designated as the party to whom all communications will flow. This person must rapidly compile vital background data. From this point on, the district's ability to tell the board's side of the story clearly and forcefully, and thereby gain public support, will determine the success or failure of the plan.

Second, consider internal communications. At this point, communications between the negotiating team and the administration as a whole are vital. The administration will be asked to convey the board's position to numerous people and may be called upon to assume additional duties in case of a work stoppage. There's no particular harm done by calling all administrators together during a negotiation and pointing out that there is always the possibility of a strike occurring and explaining that if the strike does occur, this is what is going to be expected of them. By this time also, a fan-out system should have been developed which will enable any administrator to contact any other administrator and which includes a contingency plan that will take effect in case the switchboard goes out.

Third, consider the building principal. The building principals assume a key function: the responsibility for making certain that the building is kept open and operated safely. They must compose the daily written records of the personnel present and the reason for any absences. Very frequently, principals will be actively involved in soliciting public aid. Each of these items and others must be reviewed in detail so that there is no question about who makes decisions concerning what happens in individual buildings.

The community plays a vital role in any settlement of a work stoppage. It is imperative that every effort be made to solicit community aid on the side of the board. If there is a person who has established a liaison with the community, his contacts should immediately be put to use. This is particularly true where home-and-school or parent-teacher associations exist. There should be little or no propaganda issued prior to the impasse. As negotiations begin one should not be trying to arouse public opinion against the "staggering" demands being made by the teachers. One should approach negotiations in a true good faith attempt to reach a compromise, to resolve questions, to complete a satisfactory agreement. It is only when a strike appears imminent that one begins to think in terms of community involvement. Contact the local police department and the board's attorney. The board should know in advance what plans the police have for meeting strike threats and how much support can be counted on. At the very least, they should also be notified early that a strike is probable.

Once the strike seems imminent, an emergency meeting of the board should be called to explain the situation facing the district and to establish clearly how far the board will authorize the negotiating team to go in order to avoid a work stoppage. Once the board has made its decisions, it should be wholehearted and firm in support of its negotiating team.

There is rarely anything more controversial within a community than a school strike. Hence board members must be unusually well self-disciplined and, now, more than ever, united behind one spokesman.

During the strike itself, there are several pitfalls. The teachers' organization naturally will try to win the strike, to force the school system to capitulate. Common pressure tactics include an outpouring of descriptive propaganda; picket lines; marches in the community; public meetings with the mayor. One should anticipate such maneuvers and be ready to counter them.

Chapter XI

Administering The Contract: Arbitration

> *"Those eight people sitting around a director's table on the ninth floor of 140 West 51st Street might be helping the man at the table's head, an arbitrator, decide who gets the $15,000.00. That happened once, but it's more likely to be a case like that of a male employee, one of forty at a plant with seven hundred women, who was discharged for reading aloud in the company cafeteria spicy passages from love letters from a woman worker who had jilted him. For the process of arbitration, a growing business, most often involves human rather than commercial problems."*

What It Is

The arbitration process begins where other methods of dispute settlement leave off. When a matter is referred to arbitration, the parties involved are presumed to have explored every avenue of settlement and compromise. Only as a last resort do they call upon an impartial person for a judicial decision. Arbitration is a tool, and, like other tools, it has limitations as well as uses. In the hands of an expert, it produces good results. But when abused or made to do things for which it was never intended, the outcome may be disappointing.

Contract interpretation disputes, usually called grievances, constitute the overwhelming majority of matters brought to arbitration. Before reaching arbitration, such disputes usually have gone through several procedures provided for by the contracts during which each side tries to convince the other that his interpretation and application of the contract to the given situation is the correct one. Over ninety percent of all collective bargaining contracts in industry provide for impartial arbitration in the event all previous measures fail. When time is critical, parties sometimes mutually agree to bypass earlier steps and bring a controversy directly to arbitration.

Arbitration is subject to many of the same errors and abuses prevalent in law suits. Employee organizations may try to use arbitration as a harassing technique —to attack a particular individual, or to effect a change in a contract which they were unable to accomplish in negotiations, or to soften up the employer prior to a negotiating period. Employers, too, sometimes practice harassment. For example, they might be most reluctant to resolve a grievance and consequently will force the employee organization to arbitration because they feel that the cost of arbitration itself will induce a favorable compromise.

Frequently, the union does not accurately assess the importance of a grievance, and consequently each and every grievance will end up going to arbitration. Such obsessive arbitration—proceeding, perhaps from an employee's inherent dislike of management— constitutes a severe and common abuse of a very time-consuming and costly process.

One cannot overlook the importance of a principle as a reason for proceeding to arbitration. If the principle is important enough, even a minor problem may be worth taking to arbitration. But too often arbitrators must waste their time and energy—and your money—settling financially insignificant disputes which are unlikely to recur and in which no major principle is at state. In any event, remember that the purpose of arbitration is to resolve a dispute, and by resolving it, establish guidelines by which the parties can live until such time as either one of them might wish to renegotiate that particular portion of the agreement.

The Board's Representative

The superintendent should almost never present the board's case in a grievance arbitration proceeding.

The old saying among lawyers that whoever represents himself in litigation has a fool for his client certainly applies to arbitration. In many arbitration proceedings, the superintendent will be the chief witness for the board. True, some superintendents might be agile enough first to testify and then to examine themselves under redirect questioning, agile enough to be both advocate and expert witness, however few superintendents would wish even to try. The board must be represented in arbitration proceedings by a specialist—a lawyer or consultant expert in presenting arbitration cases arising in the public sector.

Selection of Arbitrators

Panels of arbitrators have been selected for their experience, competence, and impartiality. An arbitrator must not only be acceptable to both parties, but continue to be acceptable regardless of the fact that his award upholds one party against the other. The person losing a decision must be satisfied with the arbitrator's reasoning or that arbitrator will not be selected by that person again. Arbitrators with several years experience have been used time and time again, called the shots as they saw them, and yet continue to be acceptable to the adversaries involved.

Usually, when a person first becomes a nominee for membership on an arbitration panel he is asked to submit a statement of his professional qualifications and also to list references acceptable to both labor and management. This information is usually verified by a committee, which then makes the decision on the prospective arbitrator's eligibility. Once he is determined acceptable, his name is then included on lists from which the parties themselves may select arbitrators. Each party to the proceedings receives the same list of five to nine names and has the right to cross off any number of names, numbering those that remain on his list in his order of preference. Once the two lists are returned to the arbitration organization, the selection of the arbitrator is made. If the two lists do not contain one name which is mutually acceptable to both, a second list is mailed out and sometimes a third. Eventually the arbitrator is selected by this process. If the two parties fail to find a mutually acceptable arbitrator, the administrative agency then appoints one.

School boards and employee organizations have ample opportunity to investigate the qualifications of arbitrators available to them. But one should resist the temptation to use a box score approach, to rate decisions of a given arbitrator in terms of "wins" and "losses." It doesn't work. Reputable arbitrators call their shots as they see them. For example: a management representative in the private sector prepared, presented and won more than thirty cases in a row before three arbitrators of high standing with the American Arbitration Association. That is to say, each of the three arbitrators handed down ten or more consecutive decisions in favor of the company. Why? Not because the arbitrators were biased, but because management had a good case each time and prepared and presented it with professional skill.

Preparation for Arbitration

The first portions of the contract the advocate studies are those to which reference is made in the grievance itself. He checks the "Board's Rights Clause" to determine what it says. Is there a restriction placed upon the arbitrator? Have the parties agreed in advance that the arbitrator is not permitted to alter or modify the agreement in any way?

Second, he studies the written record of the case, the grievance itself and the various responses. Once he has assimilated this material and has prepared relevant questions, he sends a copy of the questions to the chief witness, frequently the superintendent of schools. A few days later, after there has been time to study the questions and search out any information, the chief witness may be called on a special recording telephone, interviewed in great detail, and a tape cassette recording made. Very frequently, this interview will raise additional points and lead to other questions; these are listed and rechecked with the witness.

Prior to the hearing, the advocate meets with the witnesses to discuss their testimony. Usually he prepares them by conducting an unofficial cross-examination. The advocate wants to know what the witness is like, how he reacts under this kind of questioning, whether he is defensive, sweats. Sometimes a witness who is absolutely truthful looks as if he were lying and the advocate wants to avoid making a false impression.

Preparation for the arbitration hearing should include instructing witnesses on how to handle themselves properly on the witness stand and making them aware of their testimony in the total case. They must be ready to respond to the questions likely to be asked of them and to refrain from indignation when cross-examined. They must know that it is entirely proper for the opposing party to make every attempt to attack their credibility.

Next, the board's representative sits down to write the opening statement—a recital of the facts of the case, a recital of what he intends to prove, and an indication of the documentary evidence that will be introduced.

Evidence can be presented by direct examination of witnesses, by cross-examination of opposing witnesses, and by documentation. One's strongest case invariably is based upon direct testimony of the persons involved. The advocate uses the opening statement to isolate the facts that must be proven and to determine the parties that have access to that information. He begins preparing questions for each of the witnesses, based upon the evidence each can present. Thus, as a general rule, it is wise to have one or more corroborating witnesses. The advocate prepares the exhibits with sufficient copies for all parties, so that he can present the exhibits into evidence at the hearing utilizing the witness. As much as possible, he bases the total case upon the board's own witnesses.

Once this is accomplished, he then attempts to determine areas of weakness in his case. What is the opposing party going to prepare? What type of evidence might they introduce? Very frequently this process will lead to a whole new series of questions for the board's witnesses, because, of course, one does not want the story of one's own witness to be changed by the cross-examination.

One is not trying to avoid the truth. Rather, the advocate must know the *total* truth before he actually sits down to begin the hearing. If the witness has weak spots, if he has dates mixed up, if he is shading the truth even slightly, this must be known in advance and prepared for. Very frequently an advocate will anticipate the case the opposition is going to present and will have prepared a rebuttal with the witnesses who may or may not actually be used depending upon the manner in which the opposing case develops.

A fews days or a week or two before the actual hearing, the board representative will meet with the witnesses to go over all questions and to make sure that they understand what their role is. He will then summarize in paragraph form the testimony expected from each witness. Such repetition serves not only to refresh the board's representative so that, during the confusion of the hearing, crucial points are not forgotten, but also to generate a written record that can be used during the questioning particularly if the witness begins to be flustered. This much accomplished, the advocate is ready for the arbitration hearing.

The Hearing

Once the date has been established, the details handled, the parties meet together for the hearing at whatever spot has been selected—often on neutral ground, perhaps the offices of the board of education or the library or a conference room. An arbitrator is free to conduct the case as he sees fit. He can be as formal or as informal as he desires.

If the parties have not agreed upon a question to submit to the arbitrator prior to the hearing, this is the first order of business.

Framing the Question

The first problem in the arbitration procedure is to frame the question to be arbitrated. Many arbitration cases are won or lost even before an arbitrator is selected —framing the question properly is that crucial. Some board-association agreements specify that a dispute over what constitutes an arbitrable issue shall be itself decided by the arbitrator. Another example: the parties might well agree in advance of the arbitration hearing that the arbitrator should confine himself to deciding whether the board's denial was or was not justified under the article of the agreement designated by the association.

If a board believes that the employee merely has a gripe, not a grievance, or that the grievance is non-arbitrable, the board must clearly state its position in writing before the services of an arbitrator are sought. This may best be accomplished in the board's answer at the last pre-arbitration step in the grievance procedure. If such answer is cogent and convincing enough, the employee representatives may decide not to proceed further. The board or the superintendent may find it desirable in denying a grievance to spell out its reasons in sufficient detail to enable the statement to be used as the formulation of the question to be considered by the arbitrator.

The board and the association should try to agree in advance on a submission statement, defining and delineating the issue or issues to be presented for the arbitrator's decision. Never should such a submission statement authorize the arbitrator to exercise unlimited discretion in his award. An appropriate submission statement might read: "What remedy, if any, should be ordered by the arbitrator under the applicable terms of the present agreement, if he should find a violation or misinterpretation of this agreement to be involved in the grievance submitted to him?"

Procedure

Most arbitrations are conducted somewhat as a court case is: an opening statement by the initiating party, followed by a similar statement by the other side. Who is the initiating party? There is a rule of thumb that stems from industrial disputes: if the case involves discharge or discipline, the employer presents his case first—preparing and presenting evidence proving that what he did was correct. In any other type of case, the employee organization presents its case first and is considered the initiating party. But again, individual arbitrators may vary the rule.

After the opening statements, the initiating party presents its evidence, witnesses and arguments. Each witness is then subject to cross-examination. Once the initiating party has completed his witnesses, the other party begins its own case, presenting evidence through arguments and witnesses, who in turn of course are subject to cross-examination by the initiating party. Finally, there is a summation by both parties, usually following the same order as in the opening statement.

This is the customary order. The arbitrator may change it on his own initiative or at the request of either party. In any event, the order of presentation does not imply that the burden of proof is any more on one side than the other. Both parties must try to convince the arbitrator of the justice of their position.

Opening Statement

The opening statement should be prepared with the utmost care, because it lays the groundwork for the testimony of witnesses and helps the arbitrator understand the relevance of oral and written evidence. Although it is brief, it should very clearly identify the issue, indicate what is to be proved, and specify the relief sought. It's not unusual for the opening statement to be written out, with a copy available to the arbitrator. Such a copy is particularly important if the party is not going to prepare a post-hearing brief which sums up all its arguments and testimony. But in any case, the opening statement should be presented orally, because the oral presentation adds emphasis and gives a persuasive force.

Stipulations

When facts are not in dispute, one side or the other should stipulate to such facts, reducing hearing time and costs.

Documentation

The one document always presented at the hearing is, of course, the contract. Others are records of settled grievances or jointly signed memoranda of understanding, correspondence, minutes of contract negotiation meetings, personnel records, medical reports, or anything which pertains to the issue in question. These materials should be physically presented to the arbitrator, with a copy available for the opposing side. Usually the arbitrator will accept the material, first asking the opposing party if it objects. He will note any objections, but normally will accept material regardless, giving it the weight that his expert judgment tells him that it warrants.

Direct Examination

Again, one builds one's case most effectively on one's own witnesses, under direct examination. As much as possible the witness should be permitted to tell his story in his own words without interruption. Because arbitration proceedings are informal, leading questions are common. But they are rarely absolutely necessary and, if objection is made, an arbitrator will often request that the practice be stopped.

Cross-examination

Cross-examination tries to force a witness to disclose facts that he might not have related in direct testimony, to correct misstatements, to place the facts in their "true" perspective, to reconcile apparent contradictions in his and others' testimoney, and to attack his very credibility as a witness. But don't expect to be a "Perry Mason". Rarely is the case resolved by brilliant cross-examination. Ideally, cross-examination should be brief and well-planned. Every attempt should be made to avoid giving this opposing witness the opportunity to restate and restate and restate a point that is harmful to the position being taken by the board. Each witness should be approached individually, and there may be occasions when cross-examination should be waived.

Objections

Advocates for either party may attempt, by technicalities, to tie up the proceedings. For example, one group may object that certain materials are not proper evidence. If such protests are successful, facts that one party considers essential may be barred. In most cases, an experienced arbitrator will not permit this to occur. Again, the arbitrator is not bound by the rules of evidence. In effect, he is attempting to secure the truth of the situation—to weigh the facts in terms of his knowledge of industrial practice, arbitration awards, and his interpretation of contract language. He recognizes that an agreement rarely dots every "i" or crosses every "t". It is impossible for the parties negotiating a contract to anticipate every possible situation which might occur. Problems invariably arise because some language is ambiguous. The experienced arbitrator will usually not permit legal technicalities to prevent him from making a proper ruling on a particular situation.

Invariably, arguments will have been presented throughout the entire course of the hearing, since it is informal in nature. However, the arbitrator might very well insist that the parties first concentrate on presenting the evidence and refrain from precise argument until the summary. Whether he so insists or not, one's final argument should be full and carefully refute all arguments of the other side.

Close

When all evidence has been presented, all witnesses have been heard, all documents have been accepted, it is then time for each party to prepare and give a summary—to restate the factual situation, to emphasize again the issue and to lead the arbitrator toward a favorable decision.

Briefs

The arbitrator should be informed if and when either party intends to present a post-hearing brief. At the conclusion of the hearing, the arbitrator normally establishes a time of two weeks to thirty days during which the brief must be submitted. Frequently he will provide an additional two week period for a reply brief.

In a brief, one is not expected to produce any argument that will help the opposing party. The arbitrator is experienced. He can weigh what is said. He can compare it with the language of the agreement. He can compare it with the position taken by the other party. He is prepared to make the final determination. He neither needs nor requires each party to make a "balanced" presentation. And, of course, as at the arbitration hearing, one is no longer attempting to convince the opposing party. Conciliatory gestures have already been exhausted in the grievance procedure. Each side has argued the position with the other. They've used reason. They've used logic. They've pointed to past practice. They've analyzed the meaning and intent of the contract—and they have failed to convince each other. If they had, there would not be need for arbitration. So now in arbitration, present your arguments *to the arbitrator*. He is the one who needs to be convinced, not the opposition.

Upon receipt of the briefs the arbitrator begins to study the evidence, his notes, and to prepare his award. The award is normally due on or about thirty days after the close of the hearing. The "close" itself is designated by the arbitrator as the last date upon which briefs will be accepted or, if briefs are not submitted, the end of the hearing itself.

Cost of Arbitration

In most cases, the cost of arbitration is economical, relative to the cost of lost time, strikes, bad morale, frustration, and the other ills that affect us in labor relations. The first expense, of course, is the arbitrator's daily charge. In most cases, the arbitrator anticipates a one day hearing and one to one and one half days in which to study and write his award. His fee will vary but will always be known to you in advance. It probably will be $150 to $250 a day. Savings involved in selecting a $100-a-day arbitrator rather than a $200-a-day arbitrator are negligible since the cost is split between the parties. In any case, the arbitrator should be selected because of his appropriateness and skill, not because of his fee.

A written transcript also costs money. In industrial arbitration, the written transcripts are rare. In many cases no written record need be kept. The arbitrator himself simply takes notes. However, if one believes that one's case is quite complex or that arbitration may last several days, a written record may be worth the cost. A certified court reporter—not a secretary—should make the transcript, someone who can certify as to accuracy. Again, the cost of the transcript, frequently rather large, may be shared by both parties although this is not necessarily so. If only one party desires the transcript only that party will pay.

Each party must also bear the cost of preparing its own case. It cannot be overemphasized that preparation is probably the most vital aspect of arbitration. It should not be neglected. If the case is of sufficient importance to go to arbitration the very best personnel possible should be secured to prepare and process it, and cost should not be an issue.

In addition, arbitration may involve administrative fees—fees charged by the American Arbitration Association for the work that it may perform in bringing the parties together and in selecting the arbitrator. A state or federal agency does not charge administrative fees; the cost of their total operation is borne by the taxpayers. All these costs must be weighed, not only against potential frustration, loss of morale, or strike and disruption, but also against the effect upon the contract language if one compromises one's position in the grievance procedure and therefore loses essential management prerogatives. Invariably, the long-term value of successful arbitration greatly exceeds its short-term cost.

In summary, there are four general principles to keep in mind as you develop arbitration techniques:

1. If an opening statement explaining the rationale of the case is to be presented, it should be clear, concise, and well organized.
2. Exhibits showing the factual basis for points in contention should be presented in the course of the hearing.
3. Direct examination of witnesses should be to the point, complete but not repetitive.
4. Cross examination should be used carefully and only in situations where the advocate is almost certain that the testimony obtained will weaken the case of the opposing party.

Chapter XII

Administering The Contract: The Arbitration Award

The "Award" is the written document returned to the parties by the arbitrator—his decision upon the matter submitted to him under the arbitration agreement. Ideally, it should decisively dispose of every specific question in dispute. His award must conform to the limits established by arbitration agreement. For example, normally the arbitrator is mandated not to alter, modify, or change any portion of the actual contract—nor to go beyond the question.

However, the value of the award does not stop with the immediate parties. All in this field learn to study awards, determine their applicability to their situation, and receive guidance to the approach of arbitrators to the interpretation of contract language.

The Four Parts of the Award

Most awards can be divided into four sections. They usually begin with a statement asserting that a hearing was held on a particular date and then list the question(s) submitted to the undersigned arbitrator and the persons who were present for each side.

Second, there may be a very short summary of the situation. For example:

> The grievant had frequently been absent from work unexcused. On such and such a date he was absent again. The company says he did not telephone; the man says he did. The company discharged him for his absence on that date, plus his accumulated past record. The company requests that its action be upheld; the union requests that he be reinstated with back pay.

This type of statement is merely a short, factual summary of the nature of the case.

Third, the arbitrator will present the facts as they were presented to him. He will indicate the testimony and documentation provided by both sides, adding his own observations so that everyone can clearly understand why he has reached his decision.

Finally, there is the award page itself. The arbitrator might, in the body of his observations, indicate the ruling to come. However, the award page constitutes his decision. He might say the discharge of the grievant was justified. He might say the discharge of the grievant was unjustified under the terms of the agreement and that he shall be reinstated effective such and such a date.

Again, arbitration is an attempt to resolve a dispute that arises from a misinterpretation, misapplication, or violation of the contract. On its face, one would assume that one should be able to read the contract and know automatically that it means this or it means that. However, this isn't the case. A few illustrative awards should prove this point.

Example One: an arbitration case concerning a *salary guide* with one particular section titled "Masters Degree or Full Vocational Certification." An *industrial arts* teacher submitted a grievance because he felt he had full vocational certification and was not being paid accordingly. In the arbitration proceeding itself, the board of education pointed to the minutes of a board meeting in 1965 in which it was asserted that those *vocational* education teachers who had full vocational certification would be paid on the same scale as a teacher with a Master's Degree.

The teachers' organization argued that the contract language was clear and unambiguous. It meant precisely what it said. If any teacher had either a Master's Degree or full vocational certification, he was to be paid on that scale. The board disagreed. It pointed out that those vocational education teachers who had preliminary certification were paid on the bachelor's scale and that there was nothing anywhere in the contract which mandated such payment. How did the case turn out? The position of the board was upheld.

Example Two: a new superintendent came into a school district. He read the contract, and the contract stated that the school day shall be seven hours. He discovered, almost inadvertently, that as a matter of practice the special education teachers left the school when they finished with their last student, which was approximately a half hour to an hour before other teachers. He required them to remain as long as the other teachers because, again, he felt the contract was clear and unambiguous. It stated precisely the length of the school day and, of course, the contract applied to all teachers. The teachers' organization pointed to contrary past practice involving the special education teachers going back approximately ten years. The arbitrator relied upon past practice, stating that there was no question but that the length of the day for the special education teachers was a negotiable matter. However, since he felt the board did not have the power to change the school day unilaterally, he ordered the special education teachers to be returned to their old schedule. In this particular case, the teachers' organization had requested that the special education teachers be paid one hour per day back pay from the beginning of the school year. The arbitrator rejected this argument, merely requiring that they go back to their old schedule starting with receipt of the award.

Example Three: a case involving a dispute over personal leave days. The contract stated that the superintendent had the power to determine the validity of a request for personal leave with pay. The superintendent had ruled that a particular reason was not valid and the teachers' organization had challenged him. There is no precedent for decisions in this area yet. However, the superintendent established as fact that he had certain standards, that he had followed these criteria consistently, and that he possessed the authority to make the determination based upon those criteria. The arbitrator agreed with him and refused to overrule the superintendent.

Example Four: a case involving a discharge in the private sector, but with general application. The company was engaged in the manufacture and shipment of phonograph records and the work force was primarily female. There were three relevant contract clauses: first, a management rights clause; second, a discharge clause which guaranteed sufficient and reasonable cause; third, a clause insuring the company's right to establish reasonable work rules. Two company work rules were involved in this case: first, a rule barring threats, intimidation, coercion or interference with fellow employees on premises—the first offense making the employee subject to discharge; second, a rule which made the creation of discord or lack of harmony, the use of vulgar or abusive language or the making of false, vicious or malicious statements concerning any employee, the company or its product sufficient reason for immediate discharge.

This particular case revealed great discord among the employees to the point that a group had filed a complaint against a fellow employee, arguing in their grievance that she had threatened, intimidated and coerced fellow employees, used vulgar and abusive language and made false, vicious and malicious statements concerning other employees. The company discharged the employee involved; however, the union intervened, and the company agreed to keep her on the job. Thereupon, the company issued a letter which was read to everybody in the plant. The last paragraph of the letter stated: "Since this is the first time there has been a complaint of this nature, management is taking a lenient stand and gives due warning that a repetition of these violations will meet with immediate discharge."

A month or so later, the company again discharged the same employee for the same reason. In arbitration, the testimony itself necessarily revolved around the language used by the discharged employee. In this particular case, there were union members testifying on behalf of the company, as well as union members testifying on behalf of the grievant. One witness for the company testified that the grievant had started a *false* rumor that she was pregnant. The witnesses for the grievant asserted that they heard the woman herself say, "If it's a boy I'm going to name it Joseph." Ultimately, the arbitrator ducked this particular issue and worded his award as follows: "It is possible that the union witness did start the rumor, or that the grievant started it, or that one of many others might have done so. Evidence presented at the hearing is insufficient to reach a determination, and for the purpose of deciding the validity of the discharge of the grievant, these allegations are disregarded." In other words, there was a mass of conflicting evidence revolving around this one particular issue and sufficient clear evidence on the other issues so that the arbitrator felt he need not attempt to determine who lied or who was truthful.

When the award got into the issue of intimidation and coercion, the arbitrator decided several of the employees truly were frightened of the grievant and that the grievant had used vulgar and abusive language —loudly and in a very personal manner. Moreover: "This arbitrator is well aware that language which might be considered vulgar and profane in a social situation is commonly accepted as the language of the shop. The question to be determined, however, is whether the language used by the grievant exceeded the constraints of acceptable shop language." And he went on to say that it was apparent from the testimony that the language used by the grievant did exceed the bounds of acceptability.

Witnesses on behalf of the grievant testified that they often used the same type of language that she used and that they heard other employees doing the same. In response, the arbitrator stated, "There is no particular reason, with or without evidence, to doubt that others used the language or epithets ascribed to the grievant. However, this does not lessen the allegations made against her. It is apparent that others did not use such language to the degree that the grievant did nor did they use it as part of their commonly expressed vocabulary." Eventually, the arbitrator reached the crucial issue: "This arbitrator is convinced, however, that the allegations made by the company that the grievant did threaten other employees, did use vulgar and abusive language, and did make vicious and malicious statements concerning employees perceived themselves to be threatened and intimidated, so much so, that they requested police escort on different occasions." The arbitrator therefore supported the position of the company and ruled that the individual was discharged for just cause.

Further Examples: to date, most of the arbitration cases in education are not so simple and clear cut. For example: a case in which an individual requested a personal leave day. In her particular case, the airlines had changed the time of her charter flight, and the superintendent refused to grant her a personal leave day with pay, stating however that she could go without pay—which she did, and then entered a grievance. The board argued that the efficiency of the school was harmed by this teacher's leaving. The arbitrator, in discussing the various positions, pointed out that an article in the contract clearly gave the principal the authority to grant leave with due regard to the requirements of his school. He went on to say that the principal had a positive obligation to maintain efficiency in his school. As an interesting aside, imagine the personal dilemma confronting the principal when this request for a leave day was made. Here was an exemplary teacher, a credit to the school, making a request which contradicted his obligation to maintain efficiency.

The arbitrator, in his award, raised these questions: "Do the events described by the grievant in this context constitute extenuating circumstances sufficient to outweigh 'requirements of the school' so as to provide her with day off with pay? Who, besides the grievant, was affected by these circumstances? How serious were these circumstances? Could she have changed the circumstance? Knowing long in advance that reservations could not be obtained for her preferred day of departure, could she not have made other plans?"

In beginning to answer his own questions, the arbitrator said it was clear that the conditions described by the grievant were self-imposed, subject to her will, and to her capability to change. In this light, the conditions she described were only "extenuating" insofar as she desired not to change them. And finally, weighing all the evidence and making his final statement, the arbitrator said: "On the other hand, the principal has an absolute obligation to maintain efficiency. In the principal's judgment while he considered the grievant's request reasonable, he nevertheless decided granting leave would affect the efficiency of the school. This was not a capricious judgment, lightly arrived at. As it turned out, the grievant's absence in fact, lowered the efficiency of the school. The superintendent and principal were provided contract language that gave them the right to make the decision in terms of the effect upon the school."

Even though in this case the teacher was an outstanding person, the arbitrator stated that her merit could not be the final determining factor; the efficiency of the management of the school came first.

In another recent case, the arbitrator pointed to the demand made by the board in negotiations when it had, in effect, requested the same rule that a superintendent had now promulgated. He concluded: "Its efforts to achieve in arbitration what it could not obtain in the pre-contract negotiations in spring and summer of 1969 are not persuasive. But this finding does not stop the board from taking action against specific teachers who are unable to meet their professional responsibility and obligation." In short, the arbitrator found against the board. This arbitrator took the position that if something is requested in negotiations and not achieved, it is not proper for him to grant it within the framework of grievance arbitration. Furthermore, he pointed out to the board that, regardless of his findings, if a teacher reports to work late, the board has full authority to discipline that teacher and should do so—but should not attempt to promulgate a rule applying to all teachers in order to penalize a few.

Arbitrability

In many cases, the question arises as to whether the issue, the grievance, is actually arbitrable. The normal arguments against arbitrability are that the grievance was not filed within the time required by the contract or that it does not fall within the scope of the definition of a grievance. On these issues arbitrators rule variously. The "timeliness" of a grievance is sometimes difficult to ascertain. For example, it's possible to have what is called a "continuing grievance". In other words, the contract clause might state that a grievance must be filed within thirty days. But when did the grievance actually occur? If an illegal or improper order is given an individual, and that order is given to him each day, the grievance is, in effect, repeated each day. If the board attempts to argue that the grievance time begins on the first day the order was given, it's very apt to lose.

Another problem common in public employment occurs when a board decides that—effective on such and such a date, possibly two, three, four months in the future—it is going to take a certain action. When does the grievance begin? Does it begin on the date that the board passed the motion or does it begin on the date that the action itself occurs? Arbitrators differ, depending upon their understanding of the grievance and of the manner in which it affects the working relationship.

Consider another arbitration award concerning timeliness. The arbitrator said: "An initial issue on arbitrability has been raised by the city based upon the grievant's failure to file his written grievance by the end of the shift on the day following the discussion, as required under the contract." Under the definition of a day contained in the agreement, the grievant was required to submit his written grievance no later than the end of his shift on Monday, since the date the grievance occurred was a Friday. The union conceded that the grievance was not filed as provided by the contract, but argued that the city had waived and abandoned any right which it initially may have had to object to the timeliness by not raising the issue.

The arbitrator continued: "I do not believe that a failure to object to the grievance at the first or second steps of the grievance procedure contained in this collective bargaining agreement constitutes a waiver of the city's right to have the issue considered in arbitration since it was clearly raised at step 3 level." He went on to state: "If the matter had not been raised prior to the arbitration hearing, a waiver or abandonment of the right to do so might well be found to exist." But note that he did not say that it would be found to exist.

Arbitrators are rather evenly divided in their approach to the problem of a defense being raised in arbitration which has not been raised during any previous level of the grievance procedure. In this particular case, the merits and the timeliness were both discussed prior to arbitration. In so noting the arbitrator said, "However, the union was apprised of the timeliness issue long before the demand for arbitration was filed, and while the grievance was still in the hands of the parties." Therefore the arbitrator ruled that this particular issue was non-arbitrable.

It is important to remember that one arbitration award does not create a binding precedent. Each arbitration case stands on its own merits, and the arbitrator is free to reach his determination after weighing all the evidence, irrespective of the findings of any other arbitrator.

Chapter XIII

Living With The Law of New Jersey

INTRODUCTION

The New Jersey Employer-Employee Relations Act has been amended twice since it was first adopted in 1941: once in 1968 (Chapter 303) and once again very recently, in October of 1974 (Chapter 123). The latest amendments have an overall effect of "putting teeth" into the old 303, but its language creates many new questions as well as answering some old ones.

The single most significant feature is its opening section which establishes for the first time in New Jersey a specific list of unfair practices prohibited to public employers and employee organizations and which empowers the Public Employment Relations Commission (PERC) to enforce these prohibitions with the full authority of state law. In addition to establishing unfair practices, the Act also significantly alters past rulings in areas affecting collective bargaining and impasse settlement. Because the Act is so new, there are no true precedents to guide boards in mapping conduct and policy. But, although new, the Act is hardly unique. It is very similar to statutes in Pennsylvania and ten other states which are in turn very similar to the language of the National Labor Relations Act (NLRA). One can look to the experience of boards in Pennsylvania and elsewhere to anticipate the situations which will arise in New Jersey. Moreover, there is a substantial, dynamic body of labor law in the United States as well as the extensive experience of the National Labor Relations Board (NLRB). It seems fair to assume that PERC will tend to look to NLRB history and to the precedents in national labor law when establishing its own guidelines in administering the New Jersey Act. With this background in mind, and remembering that our conclusions are quite tentative, let us examine the implications of the new Act section by section, beginning with the Unfair Practice prohibitions.

INTERFERENCE, COERCION, DISCRIMINATION

Abstract from NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT

P.L. 1974, c. 123—effective January 20, 1975

An Act to amend and supplement the "New Jersey Employer-Employee Relations Act," approved April 30, 1941 (P.L. 1941, c. 100) as said short title and act were amended and supplemented by P.L. 1968, C. 303.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey.

1. a. Employers, their representatives or agents are prohibited from:

(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.

(2) Dominating or interfering with the formation, existence or administration of any employee organization.

(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act.

(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act.

(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement.

(7) Violating any of the rules and regulations established by the commission.

Items 1a.(5) and 1a.(6) above, concerning bargaining in "good faith", are sufficiently crucial and complex to merit separate treatment in a section following. The remaining prohibitions should be self-explanatory; but because they are the most serious, most costly, and most *frequent* of unfair practice complaints, they require some additional attention.

By spelling out the precise nature of potential employer sins as well as facilitating the redress of grievances, the new Act will tend to encourage a larger volume of charges. Moreover, in recent years there has been an increasing amount of organizational activity among support personnel (custodial employees, bus drivers, cafeteria people, teachers aides, secretaries) as well as a general surge of militancy within established groups—two conditions which lead to tensions which lead to unfair practice charges. The board need not walk on tip toes, but it should be familiar with the provisions of the Act and their implications for day to day conduct and become sensitive to the simultaneously heightened fears and expectations of its employees. When militancy prevails, sometimes even the best efforts are insufficient to prevent charges. But in general, the surest way to avoid an unfair practice complaint is to establish practices that *are* fair. When in doubt, observe the following do's and don'ts:

During an Organizational Drive

During a drive, tempers tend to run short and sensitivities are magnified. Employers should make a particular effort to avoid any word or gesture which may be misconstrued as interference or intimidation. In particular:

DON'T ever *threaten* anyone or *promise* anyone anything. DON'T threaten individual employees with dismissal or disciplinary action if they join the union. DON'T threaten to abolish certain jobs if the organizing effort succeeds. DON'T promise or imply that there will be financial benefits forthcoming if the union fails. DON'T make any statements, private or public, which might be construed as such threats or promises.

DON'T interfere or become involved in any way with the organizational drive. In general, DON'T agree to check union authorization cards. (If you do so, you virtually preclude the possibility of demanding PERC hold an election at a later date.) If there are two or more employee groups contending for majority representative, maintain a position of *strict neutrality*. You must not favor or *seem* to favor one faction over another. All factions have an equal right to obtain from you the names and addresses of relevant personnel. DON'T refuse to supply such information. Union organizers have the right to pass out handbills and other material to employees *on public property* during the employees' *non-working time*, (e.g. on the street after school). DON'T attempt to bar such activity. However, management *can* forbid any solicitation or union activity during working hours on school property. Although he should be cautious, an employer need not remain mute during an organizational drive. Under the Free Speech Doctrine, management has a guaranteed right to communicate with its employees— providing that such communications are *factual* and do not embody threats or bribes. Management can make its position clear: it can advise its employees that they would be better off without a union. But it should be careful to frame its opinions so they cannot be later construed as coercion. The best place for making one's case is an open public forum: a general memorandum or a question and answer session with the entire employee group. Private meetings with individual employees or small groups will invariably be interpreted as intimidation even if the employer's intent is innocent.

Again, during an organizational drive, employees will be particularly sensitive to management pressure. Union militants will be actively looking for anything that smacks of an unfair practice. If management is to avoid being charged during such a period, it must frame its words and actions with the employees' viewpoint in mind. Management's policy must not only be fair; it must *seem* to be fair.

Ongoing Responsibilities

The end of an organizational drive does not mean the end of volatile situations. Management must make continued efforts to maintain a manifestly fair policy toward all its employees. In particular, DON'T *discriminate* against an employee because of his union activities. Likewise, DON'T discriminate in favor of any employee who has refrained from joining the union. Charges of discrimination are among the most frequent and most serious of unfair practices. Moreover, they often cost the board money—in the form of back pay awards. With union militancy on the rise, even the best intentioned management group may be unable to avoid charges. Any union member who is fired or disciplined is likely to feel, true or not, that the action was taken unfairly, as a result of union activities. The best way management can prepare itself for such eventualities is to make sure in advance that its overall attitutde toward its employee groups is demonstrably, historically fair and that any action it takes against individual employees can be justified in light of past policy and precedents. For example, consider the following recent case in Pennsylvania: a nontenured teacher complained that she was not rehired because of her activities as a union militant. She had appeared on a picket line with a sign only three days after she was first hired. Subsequently, her contract was not renewed. She filed an unfair practice charge. Fortunately, however, the local board was able to establish that they really hadn't known she was active—even though her picture had appeared in the paper—and that she was not rehired because she had gotten an unfavorable reference from her teachers' college. The board also showed that it had a long record of not employing or continuing employment of people who received such unfavorable recommendations. The state commission ruled in the board's favor.

This is not to imply that a Board of Education commits an unfair practice when it discharges a striking teacher in New Jersey. It has not been determined by PERC whether such an action is illegal under Chapter 123.

A few more DO'S and DON'TS: DON'T maintain or aid other districts who maintain a hiring "blacklist". This is a very serious charge. DON'T interfere or seem to interfere with an employee who is exercising his right to grieve. DON'T attempt to persuade an employee or employee group to drop or not to file a complaint. DON'T refuse to process an employee grievance—even though you judge it to be improper or frivolous. DON'T attempt to negotiate with or deal with anyone but the *majority* representative in matters of employer-employee relations. If management wishes to meet with an employee group, it must inform the majority representative prior to the meeting. Difficulties often arise in this area because in the public sector employees are not required to join a union, and in many districts there are significant numbers of employees who don't participate in union activities or oppose the entire union concept. Under these circumstances, principals and superintendents are often tempted to treat their union and non-union member employees as two separate groups. Such conduct is in clear violation of the unfair practice Act and will prompt an immediate charge. Although not all employees are union members, the majority representative represents the interests of *all* employees in the unit. Any effort to bypass the majority representative is illegal.

Finally, DON'T attempt to make any unilateral changes in working conditions or the terms and conditions of the contract without negotiating such changes first with the majority representative. (For a more detailed treatment of this complex issue, see the section below headed "Unilateral Actions".)

THE EMPLOYEE ORGANIZATION: UNFAIR PRACTICE PROHIBITIONS

Abstract from NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT
P.L. 1974, c. 123—effective January 20, 1975

b. Employee organizations, their representatives or agents are prohibited from:

(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.

(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purpose of negotiations or the adjustment of grievances.

(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.

(4) Refusing to reduce a negotiated agreement to writing and to sign such agreement.

(5) Violating any of the rules and regulations established by the commission.

This section of the new Act is taken virtually verbatim from the NLRA. The prohibitions are largely self-explanatory and in general parallel the phrasing applicable to employers.

Employee Unfair Practices are most likely to occur during organizational drives (e.g. among support personnel groups), particularly when two or more factions are contending for majority representative. In such times, management's safetest posture is one of complete, public neutrality. Best to leave the responsibility for resolving majority representative disputes where it now legally belongs: with PERC.

Another juncture at which employee organization violations are perhaps more likely is at the onset of the bargaining season. Again, although not all employees are organization members, the organization has the responsibility for representing the interests of all employees in its unit. And, of course, all employees share equally the fruits of a successful negotiating effort—even though they may not have in any way assisted or financially supported that effort. This paradox is a source of some frustration among organization leaders. When a protracted and potentially costly negotiating period approches, tensions between organization members and non-members may surface. Management, again, should remain aloof. Boards should be particuredress inter-employee unit grievances by incorporating language into the contract. One example of this tactic occurred in a recent negotiation during which the organization representative demanded that the board agree to collect $85 from each employee non-member for the purpose of supporting the organization's negotiating effort. PERC has yet to establish guidelines on such matters, but in the past such agency shop agreements have been ruled illegal.

"GOOD FAITH" BARGAINING

PERC has recently issued a decision in which it adopts the definition of "good faith bargaining" stated in this chapter. State of New Jersey and Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO, CO-12, August 14, 1975.

Since the very beginnings of modern labor law with the Wagner Act and the NLRA, negotiators have had a duty to bargain in good faith. What the amended Act does is to make this duty *explicit*—a binding obligation codified for the first time in New Jersey state law. What constitutes "good faith"? A difficult question. Obviously, any single formula is simplistic, inadequate. "Good faith" is a matter of intent; and until state Commissions hone their powers of ESP, their judgements will remain fallible and intensely subjective. Nonetheless, if NLRB procedures and precedents hold true for New Jersey, one can formulate a few guidelines to aid board negotiators in minimizing the number of complaints to which they are subjected.

In general, PERC is likely to evaluate the *totality* of the board's bargaining posture in rendering a good faith judgement. If a board has been negotiating in good faith—that is, actively, flexibly pursuing just settlement—the honesty of its efforts will surface inevitably in a complaint hearing. In addition, there are a number of specific things board negotiators can do—and refrain from doing—in order to shore up their position and make available clear, *quantitative* indices of good faith.

1. Management CANNOT refuse to negotiate. It must meet with the majority representative whenever he is ready to go to work. This obligation applies to any mandated negotiation of working condition changes, as well as to annual contract negotiations.

2. Management's negotiators must be readily *available* to negotiate. Management cannot bargain merely at its own convenience: every second Tuesday from 8 to 10 p.m. Any attempt to limit the times or places at which negotiations occur may be interpreted as an overt indication of bad faith or "surface" bargaining. One method by which a negotiator may cover himself against this charge is to open the first bargaining session by reading into the record a formal statement of management's willingness to meet at any time to discuss any issue for as long as it takes to reach a settlement. Patience, an iron constitution, and an ability to induce insomnia are also helpful—as the example discussed at the conclusion of this section will indicate.

3. Availability is a necessary but not sufficient condition of good faith. Management must also *listen* and *respond*. One need not agree to employee proposals nor match every proposal with a counter proposal; but PERC will look for clear, *quantitative* evidence that management is maintaining a genuine ongoing dialogue with the majority representative, and a long list of constructive counterproposals will carry considerable weight.

4. DON'T *reject* any employee proposal *out of hand*. DON'T indulge in sarcasm or ridicule. If the organization makes a patently unacceptable demand, management should respond with an equally tough counterproposal: if you're stung, sting back. But keep the process moving.

5. DON'T issue ultimatums or draw lines in the dust. In both public and private statements, maintain an appearance of flexibility.

6. DON'T refuse to give relevant employee data to the organization negotiators. In general, it seems that management at a minimum must supply, upon request, the names and addresses of all employees in

the bargaining unit. It must also make available pertinent economic information (e.g., wage rates, salary rates, etc.) *if* the union can substantiate that it needs this information in order to bargain effectively.

7. DON'T insist on patently illegal or frivolous contract provisions (e.g., that the head of the employee group resign)—even if the organization seems to be behaving frivolously itself.

8. DON'T refuse to negotiate any negotiable issue. (See the section below entitled "Negotiability" for a more detailed discussion of the significant impact the new Act has had in this complex area.)

9. DO demonstrate your willingness to make *concessions* (e.g., by keeping up a steady flow of counterproposals.) Look for issues on which you can afford to compromise without undermining your overall position. A long laundry list of concessions—even minor concessions—is a bulwark in an unfair labor practice hearing.

10. DON'T miss scheduled negotiating sessions—whatever the excuse—or indulge in any tactic that serves only to delay bargaining.

11. Finally, particularly if the negotiation is likely to be long and bitter, management should protect its position by maintaining an accurate record of the negotiations from start to finish. Any recordkeeping tends to inhibit frankness a bit, but such effects should be risked if there is any likelihood of a subsequent union complaint. At a minimum, the management representative might have his own secretary present taking stenographic notes. A tape recorder can also be used, although it especially tends to interfere with freeflowing exchange. If negotiations are going to be unusually touchy, the management representative should also consider employing a court reporter whose neutrality cannot be questioned. All these measures to establish an official record are legal and well precedented.

Unfortunately, even if management follows these guidelines to the letter, it may be unable to avoid a bad faith bargaining charge. The Act tends actively to encourage unions to make complaints, and organization negotiators over the years have become quite skillful in using unfair practice charges to intimidate management representatives and thus gain psychological leverage in the bargaining process. Frankly, the actual penalties for management's conviction of bad faith are not terribly severe: generally, merely an order to return to good faith bargaining and perhaps a public notice that management has been found quilty. Nonetheless, because employers are so vulnerable to public ill will, the provisions of the Act give employee unions a powerful new weapon. One example should be sufficient to illustrate the tactic at work.

> A management negotiator recalls:
>
> *We were negotiating a contract with a union, the UAW, a very militant group... I was very young and inexperienced at the time. I didn't know how this process worked and I believed that it was a rational process where if you had good arguments and good sense you would win. I thought it was a debating contest, which it is certainly not... The tactic of the union was to force you into long negotiating sessions and tire you out and get you so sick of the process that you would agree to things that you would otherwise not agree to. On instruction of our vice president of personnel, we were supposed to be ready to negotiate at any time. Here we were locked up in this hotel; the union was playing cards down at the other end of the hotel; and we were sitting there like good representatives waiting to negotiate. About three in the morning I went to sleep. I wasn't going to sit around and wait. I wasn't asleep more than fifteen or twenty minutes when in came the union, ready to negotiate. They said, "We're ready to negotiate. You're asleep. That's an unfair labor practice. You're refusing to bargain. We're going to go and talk to your people about this." They did so, and tried to make a big deal about the incident. But all they were really trying to do was to intimidate me so that in the negotiating process I might be a bit*

more favorably inclined to go along with their proposals.

To summarize: bargain actively, frequently, and flexibly. Use seasoned professional negotiators. Maintain an accurate record of the proceedings. Stock up on black coffee. Of course, the duty to bargain in good faith also extends to the union. Most of the indicators of bad faith listed above also hold true for labor organizations.

THE NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION

The principal agency charged with enforcing and ajudicating New Jersey's unfair practice statutes is the Public Employment Relations Committee (PERC). The new law gives PERC significant additional powers and responsibilities in the collective bargaining area and, in general, tends to strengthen PERC's position as the definitive arbitrator of all New Jersey labor disputes and grievances. Insufficient time has passed since the new law's passage to allow PERC to establish a "track record" of decisions. Nor has it yet finalized its rules—although it did issue tentative procedural guidelines on January 13, 1975. Thus, New Jersey boards should be aware that the following analysis (particularly the section on complaint processing) is quite preliminary and should take it upon themselves to ensure that their representatives maintain an ongoing check on subsequent PERC policy statements and rulings.

Organizational Structure

PERC is composed of seven members, appointed by the governor with the advice and consent of the state senate: two members representing employees; two members representing employers; and three members representing the general public, including a chairman. The position of the chairman is a full-time, salaried appointment. Other PERC members serve on a per diem basis. (For further details of PERC's composition, see amended section 6, P.L. 1974, c. 123.)

Powers and Obligations

(1) To prevent and prosecute any conduct deemed an Unfair Practice under state law.

Note: Section 1 f. of the amended law strengthens considerably PERC's powers to act definitively in these matters. The section reads in part:

f. The commission shall have the power to apply to the Appellate Division of the Superior Court for any appropriate order enforcing any order of the commission issued under subsection c. or d. hereof, and its findings of fact, if based upon substantial evidence on the record as a whole, shall not, in such action, be set aside or modified; any order for remedial or affirmative action, if reasonably designed to effectuate the purposes of this act, shall be affirmed and enforced in such proceeding.

In other words, PERC's decisions are virtually final. Parties may still appeal to the courts, but in deciding the appeal the courts *may not* overturn or ignore PERC's findings of fact in the case.

Given this restriction, it is unclear how many matters will go beyond PERC.

(2) To interpret and define the language and intent of the state labor relations law.

(3) To resolve labor disputes and impasses via mediation, fact-finding, and arbitration; (See section on "Fact Finding" below.)

(4) To determine the negotiability of collective bargaining issues. (See the section below entitled "Negotiability" for a more detailed discussion.)

(5) To conduct and/or regulate elections for the selection of a majority representative of a given employee bargaining unit. Such elections need not be held in every instance; but in the event of a dispute, the employer or an employee faction may request PERC to intervene.

(6) To establish specific times for the beginning of bargaining and impasse procedures, so as to allow ample time for dispute settlement prior to budget submission dates.

In tentative regulations promulgated on January

13, 1975, PERC said that collective bargaining must begin at least 120 days prior to the budget submission date. (February). Bargaining sessions can begin even earlier than 120 days if both parties wish, nor are parties precluded from mutually agreeing on automatic contract renewal. Despite these new guidelines, it is unknown whether PERC will seek to enforce rigorously its bargaining deadlines. A virtually identical provision in Pennsylvania's Labor Relations Law has been historically ignored, principally because thorough enforcement would require more expenditures and manhours than the state commission had deemed justified.

(7) To enforce its findings by issuing cease and desist orders, remedial action orders (including back-pay orders); to serve complaints, conduct investigations, hold hearings, etc.

(8) To apply to the courts to enforce PERC decisions.

Processing an Unfair Practice Charge, Step by Step (Tentative Procedures):

WHO MAY INITIATE A CHARGE? Any individual or representative or class of individuals.

Step 1: Filing the Charge. PERC will supply a simple one-page charge form with appropriate check off boxes and blanks which must be submitted with five copies. A charge must be filed *within six months* of the alleged violation—unless the plaintiff has been prevented from lodging a charge, in which case, the six-month period will be taken to have begun at the time the plaintiff is no longer prevented from filing.

Step 2: Filing a Supporting Brief. *Within seven days* of filing the initial charge form, the party making the charge must file an extended brief in which he details the circumstances of the alleged violation. This ruling is obviously designed to reduce the number of frivolous charges filed in haste or anger or to gain bargaining leverage.

Step 3: PERC Conducts a Pre-Hearing Conference. PERC, under its current practice, will not investigate unfair practice charges. The PERC staff member assigned to the matter will bring the parties together in an informal meeting in order to reach a settlement between the parties or to clarify the issues in the case.

Step 4: Complaint. If no settlement is reached and if the charge, if true could be an unfair practice, PERC will issue a complaint.

Step 5: Hearing. PERC will set a time for a full hearing into the charge and will appoint an *administrative hearing officer,* who will function as the equivalent of the trial examiner: Hearings are not bound by the formal legal rules of evidence. The administrative hearing officer decides what is admissable and relevant and what is not. On the other hand, the legal rules of privilege must be respected, and the complaining party has the burden of proof. Under the new law, one need not be an attorney to argue a case at a PERC hearing.

Step 6. The administrative hearing officer will weigh the hearing evidence and will prepare a formal report which includes his findings of fact, conclusions of law, and his recommendations.

Step 7. PERC will receive, review, and—normally —*adopt* the administrative hearing officer's report. However, either or both of the parties may appeal to PERC prior to its decision. PERC may review the record, take new testimony, and alter or reject the administrative hearing officer's conclusions. If a hearing seems to have gone badly, the board should immediately prepare to take its case directly to PERC. Again, one need not be an attorney to argue before PERC.

Step 8: Appeal. The losing party may take its case to the appellate courts. However, boards should remember that Section (1 f.) of the new law (see above) severely limits the scope of the court's power to reverse a PERC decision.

Most disputes will eventually end at the PERC level. **Important Note:** Under the new law, an unfair labor practice complaint can be amended at *any time* during the process, before, during, or after the hearing. Responses to complaints can be amended with equal freedom. As a consequence of this ruling, hearings may tend to drag on at great length. But we have yet to see the new guidelines at work. In this area and many others, we can expect PERC to refine and alter its procedures as it acquires more experience with the unfair practice statute.

NEGOTIABILITY

In addition to establishing an explicit set of unfair practices, P.L. 1974 C. 123 made a series of crucial changes in PERC's powers vis a vis collective bargaining which have serious implications for board policy formation and negotiating strategy. Particularly significant are section 1d. and section 10 which read as follows:

d. The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. *Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court.*

10. Nothing in this act shall be construed to annul or modify, or to preclude the continuation of any agreement during its current term heretofore entered into between any public employer and any employee organization, *nor shall any provision hereof annul or modify any pension statute or statutes of this State*.

In the past, the procedures for determining negotiability were rather ambiguous. Gradually, the courts were beginning to move in and to fence off certain areas as negotiable or non-negotiable. (For example, the New Jersey Supreme Court in a recent series of decisions involving the Burlington County College and the Dunellen and Englewood Boards of Education seemed to say that certain matters did not affect major educational policy and were therefore subject to mandatory negotiations.) The new law ends this piecemeal approach and throws prior court decisions into question. As of January 20, 1975, PERC has the clear responsibility to determine negotiability. PERC has yet to establish any guidelines in this crucial area. Labor organizations contend that Section 10 will *force PERC to rule that everything* is negotiable, but pensions. Answers to this question will be given by PERC and eventually the courts.

It could be argued that this seems to have been the legislature's intent. During the debate in Trenton, opponents of section 10 argued for two board limitations of the scope of negotiability: a) that boards retain their statutory responsibilities and b) that boards retain their management rights to exercise that statutory responsibility. But these exclusions failed. In light of this legislative history, PERC may place fewer issues beyond the bounds of the collective bargaining process than are currently considered management prerogatives.

However, one should be careful here to make an important distinction with regard to PERC's new powers. Upon the request of either party, PERC has the power to determine the negotiability of an issue in dispute. But it *does not have the power* to determine the *content* of collective bargaining or to dictate the terms and conditions of a contract. Even under an unfair practice proceeding, PERC cannot insist that any agreement contain any particular provision. (e.g., the courts have overturned a NLRB remedial order demanding that a contract contain a check off clause.) In sum, PERC's power to determine negotiability should not inhibit boards' pursuit of healthy self-interest at the table. Boards *can* have management rights clauses; they can have a "zipper clause" which puts an end to bargaining. (But see the section below entitled "Unilateral Actions.") Nonetheless, the Act will obviously make bargaining more arduous for the employer. Boards should be prepared for associations to confront them at the onset of negotiations with an NJEA prepared "master contract" and to insist on negotiating every single point in that contract. Under these circumstances, if the board takes the position at the table that an issue is non-negotiable, it can be virtually certain that it will be hit with an immediate unfair practice charge.

This admitted vulnerability, however, should not deter the board from taking principled positions. For example, many associations want—and some districts have naively agreed to—contract provisions which specify class size. Such provisions ultimately affect the board's hiring and firing policy. If the board believes, as well it should, that it is its basic right to determine the number of employees to be employed, then it should stand firm, even if the association threatens a charge. Fundamental issues of principal should be tested and argued out fully—not conceded in advance. In any case, boards must be much more wary than they have been in the past about the long-term, state-wide implications of contract provisions and contract language. (See also the section below entitled "Arbitration.")

DETERMINING THE BARGAINING UNITS

Mixed Units. In general, the new Act prohibits "mixed bargaining units" (i.e., units containing different classes of employees)—*unless* the mixed unit has a *majority* of the "higher class" of employee. For example, a unit containing both teachers and secretaries must have a clear majority of teachers.

Definitions. The ambiguities and apparent contradictions in some of the language in Section 3 of the new Act give rise to several important questions. Section 3d. *excludes* "elected officials, members of boards, and commissions, managerial executives and confidential employees" from the term "*employee.*"

The term "*managerial executives*" is later defined to "include only the superintendent or other chief administrator, and the assistant superintendent of the district." In the past, assistant superintendents have been generally included in the principals' association. Are they now out? And how many assistant superintendents? In some districts, business administrators have the title "assistant superintendent." (Later, in paragraph seven, in defining "managerial executives", the title "assistant superintendent" is *not* mentioned, further confusing the issue.)

The definition of the term "confidential employee" is also open to interpretation and will become an increasingly important issue as more and more secretarial associations are organized in the next few years. Tentatively, PERC seems to have specifically excluded from bargaining units of secretaries the secretary of the superintendent and the secretary to the Board Secretary. But complete guidelines have not yet been drawn. In the absence of clear determinations, each board should initiate efforts to clarify bargaining units prior to the onset of the next annual contract session.

FACT FINDING: IMPLICATIONS OF THE NEW ACT

Under the new Act, when negotiations reach an impasse, either party can request PERC to institute fact-finding. And—this is new—the costs incurred during fact-finding are to be borne wholly by the commission. In the past, fact-finding costs were shared by the two parities—bills often running to $500 or more each. But now fact-finding is free. As a result, we must expect to see a lot more of it. In Pennsylvania where provisions similiar to New Jersey's statute have been in effect for some time, fact-finding has become almost a habit with employee groups. After all, if the employees can't settle without mediation, they're not going to settle until after fact-finding because they have absolutely nothing to lose.

The procedures applicable to fact-finding apparently will remain much the same as they have been in the past: PERC will submit to the parties a list of three fact-finders. Each side will be able to eliminate one name if it so desires. Then PERC will assign a fact-finder from the remaining list of names. As before, the parties may jointly request the appointment of a particular fact-finder, including the person who served as mediator, or a member of the commission. In a major change, the new law permits a *public fact-finding hearing* if both parties agree. In the past, fact-finding only became public knowledge if PERC chose to publish a transcript or report, which it rarely did.

ARBITRATION: IMPLICATIONS OF THE NEW ACT

In the past, boards often sought to bar the arbitrability of certain issues, even though they were in the contract, arguing that they were matters of inherent educational policy. If the unions' contentions on negotiability are correct, this may be more difficult or impossible. It thus behooves boards to examine contract language, past and future, with extra care and to insist on precise, tight phrasing.

UNILATERAL ACTIONS

Section f:

b. any changes or modifications in terms and conditions of employment are made only through negotiation with the majority representative; proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment.

The Act provides that "any changes or modifications in the terms and conditions of employment" or "proposed new rules or modifications of existing rules governing working conditions" be negotiated with the majority representative. What is a "working condition"? "A working condition is what you have to negotiate over," one professional negotiator wryly noted. In effect, the phrasing of the Act is so broad that the board risks an unfair practice charge any time it makes any sort of policy change that affects teachers. Obviously, the board should make every effort to win employee organization consent for proposed changes affecting them. The head of the local association should be consulted as early as possible. Management should be conciliatory and responsive. If the association makes some feasible suggestion, the board should incorporate it. This in itself is evidence of good faith negotiation. But despite good faith and its best efforts, the board may find that it needs to make a change which the association opposes. In general, if the board's need is serious, it should probably proceed unilaterally—understanding that it may have to face an unfair practice charge.

EPILOGUE

What will continue as major issues between the collective parties—the boards and the employee organizations?

Money

Money—salaries, economic fringe benefits—is and will probably remain a primary source of controversy. Many near-completed doctoral dissertations, including at least one in New Jersey, are attempting to measure the impact of collective negotiations upon teachers' salaries. It will be somewhat surprising if they fail to find that it has increased salaries at a greater rate than would have been expected without negotiations.

One might also expect, if studies were made, that among all public employees teachers have received a greater share, percentage wise, than have any of the other groups. Why might this be?

One reason is the "product"—the education of children as compared to the protection of the public, the collection of garbage, or the many other services performed by public employees. This is not an assessment of relative importance, but rather a measurement of the community emotional involvement.

A second reason is the readiness of the teachers' organizations when negotiations first began and their extensive supporting staffs. Large numbers of experienced and well-trained negotiators were available to assist the local organizations, probably a larger number by far than were available for any other group.

Scope of Bargaining

The scope of bargaining will remain controversial issue regardless of what the law might say or as it might be changed. The employee organizations will continue to push to negotiate matters which the board believes not to be negotiable. A law will not change this.

Possibly, over the long haul, everything will be negotiable. However, just as obviously, this will be bitterly opposed by the boards and other public managers. The battle will be joined, not only in negotiations, but also in grievances, arbitration proceedings and unfair practice hearings and will be never-ending.

The professional educators are not the advocates for local lay control of education and will continue to attempt to share, if not assume, control themselves. The difference between that which is "major educational policy" and that which is an impact of a change in such policy is not clear cut and the additional problem remains as to the impact of negotiations law upon educational law.

Settlement of Grievances

The issue of whether the Commissioner of Education or an arbitrator should resolve a grievance—or which type of grievance should be settled by which agency—is not going to be easily resolved.

Not only is the issue of the scope of bargaining involved, but also the issue of whether such arbitration should be binding or advisory. The latter issue will probably be resolved by most parties in favor of binding arbitration. The issue of the Commissioner's jurisdiction is apt to be with us much longer.

Acceptance of the Employee Organization

This might well be the most difficult issue of all. In industrial labor relations it is referred to in terms of the "maturity" of the relationship.

At some point in time the parties should acquire an empathy for the peculiarities and problems of the other. If they fail to do so, the militant adversary relationship, which might exist and be accepted at times of contract negotiation, will become the year-round relationship and as such, is not easily tolerated.

A school administration should frequently meet with the employee organization leadership to keep them aware of new problems, new conditions, and changes in old conditions. However, the employee organization which seizes upon the information it receives in such meetings to propagandize, publicize and in general, to "heat up the troops," will soon find that such meetings are not being held, and information is not forthcoming.

The parties also must learn to compromise their grievances. Some of course do not lend themselves to compromise. However, many more could be compromised than now are.

Finale

A major area that has been little considered is the impact of negotiations upon managerial procedures and does not lend itself to the purpose of this book. But consideration must be directed to problems such as the need to increase the number of administrators based upon an increase in the number of required evaluations, increased personnel functions, and the like.

The availability of administrative time is fast becoming a concern. The time demands upon principals and superintendents is increasing almost daily and boards must find means of resolving this.

The question of necessary managerial training, who is to provide it and who is to pay for it, requires thought, as do so many other problems stemming from collective negotiations.

The board's primary concern in negotiations must be operational control, as well as managerial efficiency, and must not be lost by default.

Appendix A

1947 NEW JERSEY CONSTITUTION

Article I, Section 19

Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

Appendix B

Sentences and phrases in *italics* are the portions of the law added by Chapter 123. [Bracketed] sentences and phrases in regular type are portions of the law deleted by Chapter 123. [*Bracketed and italicized*] sentences and phrases are proposed additions which were not adopted by the Legislature. (Editor's Note)

[THIRD OFFICIAL COPY REPRINT]
SENATE, NO. 1087

STATE OF NEW JERSEY

INTRODUCED APRIL 16, 1974
By Senators HORN, WILEY, FELDMAN, REDELL,
PARKER and DWYER

Referred to Committee on
Conference and Coordinating

AN ACT to amend and supplement the "New Jersey Employer-Employee Relations Act," approved April 30, 1941 (P.L. 1941, c. 100) as said short title and act were amended and supplemented by P.L. 1968, c. 303.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. a. Employers, their representatives or agents are prohibited from:

(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.

(2) Dominating or interfering with the formation, existence or administration of any employee organization.

(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act.

(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act.

(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement.

(7) Violating any of the rules and regulations established by the commission.

b. Employee organizations, their representatives or agents are prohibited from:

(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.

(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purpose of negotiations or the adjustment of grievances.

(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.

(4) Refusing to reduce a negotiated agreement to writing and to sign such agreement.

(5) Violating any of the rules and regulations established by the commission.

c. The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice listed in subsections a. and b. above. Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof; provided that no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

In any such proceeding, the provisions of the Administrative Procedure Act P.L. 1968, c. 410 (C. 52:14B-1 et seq.) shall be applicable. Evidence shall be taken at the hearing and filed with the commission. If, upon all the evidence taken, the commission shall determine that any party charged has engaged or is engaging in any such unfair practice, the commission shall state its findings of fact and conclusions of law and issue and cause to be served on such party an order requiring such party to cease and desist from such unfair practice, and to take such reasonable affirmative action as will effectuate the policies of this act. All cases in which a complaint and notice of hearing on a charge is actually issued by the commission, shall be prosecuted before the commission or its agent, or both, by the representative of the employee organization or party filing the charge or his authorized representative.

d. The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a *[final]* determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. *_Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court._*

e. The commission shall adopt such rules as may be required to regulate the conduct of representation elections, and to regulate the time of commencement of negotiations and of institution of impasse procedures so that there will be full opportunity for negotiations and the resolution of impasses prior to required budget submission dates.

f. The commission shall have the power to apply to the Appellate Division of the Superior Court for an appropriate order enforcing any order of the commission issued under subsection c. or d. hereof, and its findings of fact, if based upon substantial evidence on the record as a whole, shall not, in such action, be set aside or modified; any order for remedial or affirmative action, if reasonably designed to effectuate the purposes of this act, shall be affirmed and enforced in such proceeding.

2. Section 3 of P.L. 1941, c. 100 (C. 34:13A-3) is amended to read as follows:

3. When used in this act:

(a) The term "board" shall mean New Jersey State Board of Mediation.

(b) The term "commission" shall mean New Jersey Public Employment Relations Commission.

(c) The term "employer" includes an employer and any person acting, directly or indirectly, on behalf of or in the interest of an employer with the employer's knowledge or ratification, but a labor organization, or any officer or agent thereof, shall be considered an employer only with respect to individuals employed by such organization. This term shall include "public employers" and shall mean the State of New Jersey, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board, or any branch or agency of the public service.

(d) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer unless this act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice and who has not obtained any other regular and substantially equivalent employment. This term, however, shall not include any individual taking the place of any employee whose work has ceased as aforesaid, nor shall it include any individual employed by his parent or spouse, or in the domestic service of any person in the home of the employer, or employed by any company owning or operating a railroad or railway express subject to the provisions of the Railway Labor Act. This term shall include any public employee, i.e., any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, [heads and deputy heads of departments and agencies, and] members of boards and commissions, [provided that in any school district this shall exclude only the superintendent of schools or other chief administrator of the district] *managerial executives and confidential employees.*

(e) The term "representative" is not limited to individuals but shall include labor organizations, and individual representatives need not themselves be employed by, and the labor organization serving as a representative need not be limited in membership to the employees of, the employer whose employees are represented. This term shall include any organization, agency or person authorized or designated by a public employer, public employee, group of public employees, or public employee association to act on its behalf and represent it or them.

(f)"Managerial executives" of a public employer means persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.

(g) "Confidential employees" of a public employer means employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

3. Section 6 of P.L. 1968, c. 303 (C. 24:3A-5.2) is amended to read as follows:

6. [(a)] There is hereby established in the Division of Public Employment Relations a commission to be known as the New Jersy Public Employment Relations

Commission. This commission, in addition to the powers and duties granted by this act, shall have in the public employment area the same powers and duties granted to the labor mediation board in sections 7 and 10 of P.L. 1911, c. 100, and in sections 2 and 3 of P.L. 1915, c. 32. [There shall be a chief executive officer and administrator who shall devote his full time to the performance of his duties exclusively in the Division of Public Employment Relations.] [(b)] This commission shall make policy and establish rules and regulations concerning employer-employee relations in public employment relating to dispute settlement, grievance procedures and administration including enforcement of statutory provisions concerning representative elections and related matters *and to implement fully all the provisions of this act.* The commission shall consist of seven members to be appointed by the Governor, by and with the advice and consent of the Senate. Of such members, two shall be representative of public employers, two shall be representative of public employee organizations and three shall be representative of the public including the appointee who is designated as chairmen. Of the first appointees, two shall be appointed for 2 years, two for a term of 3 years and three, including the chairman, for a term of 4 years. Their successors shall be appointed for terms of 3 years each, *and until their successors are appointed and qualified,* except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whose office has become vacant.

The members of the commission, *other than the chairman,* shall be compensated at the rate of [$50.00] *$100.00* for each *** *6 hour* *** day *** [, or part thereof,] *** spent in attendance at meetings and consultations and shall be reimbursed for necessary expenses in connection with the discharge of their duties * * * *except that no commission member who receives a salary or other form of compensation as a representative of any employer or employee group, organization or association, shall be compensated by the commission for any deliberations directly involving members of said employer or employee group, organization or* *association. Compensation for more, or less than, 6 hours per day, shall be prorated in proportion to the time involved.*

The chairman of the commission shall be its chief executive officer and administrator, shall devote his full time to the performance of his duties as chairman of the Public Employment Relations Commission and shall receive such compensation as shall be provided by law.

The term of the member of the commission who is designated as chairman on the date of enactment of this act shall expire on the effective date of this act.

4. Section 7 of P.L. 1968, c. 303 (C. 34:13A-5.3) is amended to read as follows:

7. Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to [any managerial executive] *elected officials, members of boards and commissions, managerial executives, or confidential employees,* except in a school district the term managerial executive shall mean the superintendent of schools or his equivalent, nor, except where established practice, prior agreement or special circumstances, dictate the contrary,°°°[*or where the number of supervisors to be in the unit is less than 12.*]°°°shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership, and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations; and provided further, that, except where established practice, prior agreemnent, or special circumstances dictate the contrary, no policeman shall have the right to join an employee organization that admits employees other than policemen to membership. The negotiating unit shall be defined with due regard for the community of interest among the employees concerned, but the commission shall not

intervene in matters of recognition and unit definition except in the event of a dispute.

Representatives designated or selected by public employees for the purpose of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the commission as authorized by this act shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit. Nothing herein shall be construed to prevent any official from meeting with an employee organization for the purpose of hearing the views and requests of its members in such unit so long as (a) the majority representative is informed of the meeting; (b) any changes or modifications in terms and conditions of employment are made only through negotiation with the majority representative: and (c) a minority organization shall not present or process grievances. Nothing herein shall be construed to deny to any individual employee his rights under Civil Service laws or regulations. When no majority representative has been selected as the bargaining agent for the unit of which an individual employee is a part, he may present his own grievance either personally or through an appropriate representative or an organization of which he is a member and have such grievance adjusted.

A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment.

When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employee and the majority representative.

Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance procedures may provide for binding arbitration as a means for resolving disputes. *Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.*

5. Section 6 of P.L. 1941, c. 100 (C. 34:13A-6) is amended to read as follows:

6. (a) Upon its own motion, in an existing, imminent or threatened labor dispute in private employment, the board, through the Division of Private Employment Dispute Settlement, may, and, upon the request of the parties or either party to the dispute, must take such steps as it may deem expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between employer and employees which have precipitated or culminated in or threaten to precipitate or culminate in such labor dispute.

(b) Whenever negotiations between a public employer and an exclusive representative concerning the terms and conditions of employment shall reach an impasse, the commission, through the Division of Public Employment Relations shall, upon the request of either party, take such steps as it may deem expedient to effect a voluntary resolution of the impasse. In the event of a failure to resolve the impasse by mediation the Division of Public Employment Relations is empowered to recommend or invoke fact-finding with recommendation for settlement, the cost of which shall be borne by the [parties equally] *commission*.

(c) The board in private employment, through the Division of Private Employment Dispute Settlement, and the commission in public employment, through the Division of Public Employment Relations, shall take the following steps to avoid or terminate labor disputes: (1) to arrange for, hold, adjourn or reconvene a conference or conferences between the disputants or one or more of their representatives or any of them; (2) to invite the disputants or their representatives or any of them to attend such conference and submit, either orally or in writing, the grievances of and differences between the disputants; (3) to discuss such grievances and differences with the disputants and their representatives; and (4) to assist in negotiating and drafting agreements for the adjustment in settlement of such grievances and differences and for the termination or avoidance, as the case may be, of the existing or threatened labor dispute.

(d) The commission, through the Division of Public Employment Relations, is hereby empowered to resolve questions concerning representation of public employees by conducting a secret ballot election or utilizing any other appropriate and suitable method designed to ascertain the free choice of the employees. The division shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and nonsupervisors, (2) both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit or, (3) both craft and noncraft employee, unless a majority of such craft employees vote for inclusion in such unit. All of the powers and duties conferred or imposed upon the division that are necessary for the administration of this subdivision, and not inconsistent with it, are to that extent hereby made applicable. Should formal hearings be required, in the opinion of said division to determine the appropriate unit, it shall have the power to issue subpoenas as described below, and shall determine the rules and regulations for the conduct of such hearing or hearings.

(e) For the purposes of this section the Division of Public Employment Relations shall have the authority and power to hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony or deposition of any person under oath, and in connection therewith, to issue subpoenas duces tecum, and to require the production and examination of any governmental or other books or papers relating to any matter described above.

(f) In carrying out any of its work under this act, the board may designate one of its members or an officer of the board to act in its behalf and may delegate to such designee one or more of its duties hereunder and, for such purpose, such designee shall have all the powers hereby conferred upon the board in connection with the discharge of the duty or duties so delegated. In carrying out any of its work under this act, the commission may designate one of its members or an officer of the commission to act on its behalf and may delegate to such designee one or more of its duties hereunder and, for such purpose, such designee shall have all of the powers hereby conferred upon the commission in connection with the discharge of the duty or duties so delegated.

(g) The board and commission may also appoint and designate other persons or groups of persons to act for and on its behalf and may delegate to such persons or groups of persons any and all of the powers conferred upon it by this act so far as it is reasonably necessary to effectuate the purposes of this act. Such persons shall serve without compensation but shall be reimbursed for any necessary expenses.

(h) The personnel of the Division of Public Employment Relations shall include only individuals familiar with the field of public employee-management relations. The commission's determination that a person is familiar in this field shall not be reviewable by any other body.

6. Section 10 of P.L. 1968, c. 303 (C. 34:13A-8.1) is amended to read as follows:

10. Nothing in this act shall be construed to annul or modify, or to preclude the [renewal or] continuation of any agreement _during its current term_ heretofore entered into between any public employer and any employee organization, [nor shall any provision hereof annul or modify any statute or statutes of this State]**, _nor shall any provision hereof annul or modify any pension statute or statutes of this State_**. [_Nothing in this act shall be construed to annul the duty, responsibility or authority rested by statute in any public employer or public body except that the impact on terms and conditions of employment of a public employer's or a public body's decisions in the exercise of that duty, responsibility or authority shall be within the scope of collective negotiations._]* **[*_It is the right of any public employer to determine the standards of services to be offered; determine school and college curricula; determine the standards of selection for employment; direct its employees; take disciplinary action; maintain the efficiency of operations; determine the methods, means and personnel by which operations are to be conducted; determine the content of jobclassifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of any public employer on the aforesaid matters are not within the scope of collective negotiations; provided, however, that questions concerning the practical impact that decisions on said matters have on employees, such as questions of workload or manning, are within the scope of collective negotiations._*]**

7. Section 12 of P.L. 1968, c. 303 C. 34:13A-8.3) is amended to read as follows:

12. The commission in conjunction with the Institute of Management and Labor of Rutgers, The State University, shall develop and maintain a program for the guidance of _public employees and_ public employers in employee-management relations, to provide technical advice to _public employees and_ public employers on employee-management programs, to assist in the development of programs for training

employee and management personnel in the principles and procedures of consultation, negotiation and the settlement of disputes in the public service, and for the training of *employee and* management officials in the discharge of their employee-management relations responsibilities in the public interest.

8. For the purpose of carrying out the amendatory and supplementary provisions of this act there is hereby appropriated for the use of the commission for the fiscal year ending June 30, 1974, the additional sum of $25,000.00.

9. This act shall take effect 90 days after enactment.

Appendix C

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT

CHAPTER 303, LAWS OF 1968

An Act to amend the title of "An act to promote the mediation, conciliation and arbitration of labor disputes and the creation of a board of mediation for the promotion thereof," approved April 30, 1941 (P.L. 1941, c. 100), so that the same shall read "An act concerning employer-employee relations in public and private employment, creating a board of mediation, a public employment relations commission and prescribing their functions, powers and duties," and to amend and supplement the body of said act and making an appropriation.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey: Title amended.

1. The title of chapter 100 of the laws of 1941 is amended to read as follows: An act concerning employer-employee relations in public and private employment, creating a board of mediation, a public employment relations commission and prescribing their functions, powers and duties.

2. Section 1 of P.L. 1941, chapter 100(C. 34:13A-1) is amended to read as follows:

C. 34:13A-1 Short title.

1. This act shall be known and may be cited as "New Jersey Employer-Employee Relations Act."

3. Section 2 of P.L. 1941, chapter 100 (C. 34:13A-2) is amended to read as follows:

C. 34:13A-2 Policy declaration.

2. It is hereby declared as the public policy of this State that the best interests of the people of the State are served by the prevention or prompt settlement of labor disputes, both in the private and public sector;

that strikes, lockouts, work stoppages and other forms of employer and employee strife, regardless where the merits of the controversy lie, are forces productive ultimately of economic and public waste; that the interests and rights of the consumers and the people of the State, while not direct parties thereto, should always be considered, respected and protected; and that the voluntary mediation of such public and private employer-employee disputes under the guidance and supervision of a governmental agency will tend to promote permanent, public and private employer-employee peace and the health, welfare, comfort and safety of the people of the State. To carry out such policy, the necessity for the enactment of the provisions of this act is hereby declared as a matter of legislative determination.

4. Section 3 of P.L. 1941, chapter 100 (C. 34:13A-3) is amended to read as follows:

C. 34:13A-3 Definitions.

3. When used in this act:

(a) The term "board" shall mean New Jersey State Board of Mediation.

(b) The term "commission" shall mean New Jersey Public Employment Relations Commission.

(c) The term "employer" includes an employer and any person acting, directly or indirectly, on behalf of or in the interest of an employer with the employer's knowledge or ratification, but a labor organization, or any officer or agent thereof, shall be considered an employer only with respect to individuals employed by such organization. This term shall include "public employers" and shall mean the State of New Jersey, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board, or any branch or agency of the public service.

(d) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer unless this act, explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice and who has not obtained any other regular and substantially equivalent employment. This term, however, shall not include any individual taking the place of any employee whose work has ceased as aforesaid, nor shall it include any individual employed by his parent or spouse, or in the domestic service of any person in the home of the employer, or employed by any company owning or operating a railroad or railway express subject to the provisions of the Railway Labor Act. This term shall include any public employee, i.e. any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, heads and deputy heads of departments and agencies, and members of boards and commissions, provided that in any school district this shall exclude only the superintendent of schools or other chief administrator of the district.

(e) The term "representative" is not limited to individuals but shall include labor organizations, and individual representatives need not themselves be employed by, and the labor organization serving as a representative need not be limited in membership to the employees of, the employer whose employees are represented. This term shall include any organization, agency or person authorized or designated by a public employer, public employee, group of public employees, or public employee association to act on its behalf and represent it or them.

C. 34:13A-5.1 Division of Public Employment Relations and Division of Private Employment Dispute Settlement; establishment, functions State Board of Mediation.

5. There is hereby established a Division of Public Employment Relations and a Division of Private Employment Dispute Settlement.

(a) The Division of Public Employment Relations shall be concerned exclusively with matters of public employment related to determining negotiating units, elections, certifications and settlement of public employee representative and public employer disputes and grievance procedures. For the purpose of complying with the provisions of Article V, Section IV, paragraph 1 of the New Jersey Constitution, the Division of Public Employment Relations is hereby allocated within the Department of Labor and Industry, and located in the city of Trenton, but notwithstanding said allocation, the office shall be independent of any supervision or control by the department or by any board or officer thereof.

(b) The Division of Private Employment Dispute Settlement shall assist in the resolution of disputes in private employment. The New Jersey State Board of Mediation, the objectives and the powers and duties granted by this act and the act of which this act is amendatory and supplementary shall be concerned exclusively with matters of private employment and the office shall continue to be located in the city of Newark.

C 34:13A-5.2 Public Employment Relations Commission; establishment, powers and duties, membership, appointment, qualifications, chairman, terms, vacancies, compensation and reimbursement.

6. (a) There is hereby established in the Division of Public Employment Relations a commission to be known as the New Jersey Public Employment Relations Commission. This commission, in addition to the powers and duties granted by this act, shall have in the public employment area the same powers and duties granted to the labor mediation board in sections 7 and 10 of chapter 100, P.L. 1941 and in sections 2 and 3 of chapter 32, P.L. 1945.* There shall be a chief executive officer and administrator who shall devote his full time to the performance of his duties exclusively in the Division of Public Employment Relations. (b) This commission shall make policy and establish rules and regulations concerning employer-employee relations in public employment relating to dispute settlement, grievance procedures and administration including enforcement of statutory provisions concerning representative elections and related matters. The commission

shall consist of 7 members to be appointed by the Governor, by and with the advice and consent of the Senate. Of such members, 2 shall be representative of public employers, 2 shall be representative of public employee organizations and 3 shall be representative of the public including the appointee who is designated as chairman. Of the first appointees, 2 shall be appointed for 2 years, 2 for a term of 3 years and 3, including the chairman, for a term of 4 years. Their successors shall be appointed for terms of 3 years each, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whose office has become vacant.

The members of the Commission shall be compensated at the rate of $50.00 for each day, or part thereof, spent in attendance at meetings and consultations and shall be reimbursed for necessary expenses in connection with the discharge of their duties.

C. 34:13A-5.3 Public employees' organizations; authorization, membership, representation, written agreements, grievance procedures.

7. Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to any managerial executive except in a school district the term managerial executive shall mean the superintendent of schools or his equivalent, nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership, and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations; and provided further, that, except where established practice, prior agreement, or special circum-

stances dictate the contrary, no policeman shall have the right to join an employee organization that admits employees other than policemen to membership. The negotiating unit shall be defined with due regard for the community of interest among the employees concerned, but the commission shall not intervene in matters of recognition and unit definition except in the event of a dispute.

Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the commission as authorized by this act shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit. Nothing herein shall be construed to prevent any official from meeting with an employee organization for the purpose of hearing the views and requests of its members in such unit so long as (a) the majority representative is informed of the meeting; (b) any changes or modifications in terms and conditions of employment are made only through negotiation with the majority representative; and (c) a minority organization shall not present or process grievances. Nothing herein shall be construed to deny to any individual employee his rights under Civil Service laws or regulations. When no majority representative has been selected as the bargaining agent for the unit of which an individual employee is a part, he may present his own grievance either personally or through an appropriate representative or an organization of which he is a member and have such grievance adjusted.

A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment.

When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance procedures may provide for binding arbitration as a means for resolving disputes.

8. Section 6 of P.L. 1941, chapter 100 (C. 34:13A-6) is amended to read as follows:

C. 34:13A-6 Powers and duties.

6. (a) Upon its own motion, in an existing, imminent or threatened labor dispute in private employment, the board, through the Division of Private Employment Dispute Settlement, may, and, upon the request of the parties or either party to the dispute, must take such steps as it may deem expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between employer and employees which have precipitated or culminated in or threaten to precipitate or culminate in such labor dispute.

(b) Whenever negotiations between a public employer and an exclusive representative concerning the terms and conditions of employment shall reach an impasse, the commission, through the Division of Public Employment Relations shall, upon the request of either party, take such steps as it may deem expedient to effect a voluntary resolution of the impasse. In the event of a failure to resolve the impasse by mediation the Division of Public Employment Relations is empowered to recommend or invoke fact-finding with recommendations for settlement, the cost of which shall be borne by the parties equally.

(c) The board in private employment, through the Division of Private Employment Dispute Settlement, and the commission in public employment, through the Division of Public Employment Relations, shall take the following steps to avoid or terminate labor disputes: (1) to arrange for, hold, adjourn or reconvene a conference or conferences between the disputants or one or more of their representatives or any of them; (2) to invite the disputants or their representatives or any of them to attend such conference and submit, either orally or in writting, the grievances of and differences between the disputants; (3) to discuss such grievances and differences with the disputants and their representatives; and (4) to assist in negotiating and drafting agreements for the adjustment in settlement of such grievances and differences and for the termination or avoidance, as the case may be, of the existing or threatened labor dispute.

(d) The commission, through the Division of Public Employment Relations, is hereby empowered to resolve questions concerning representation of public employees by conducting a secret ballot election or utilizing any other appropriate and suitable method designed to ascertain the free choice of the employees. The division shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and nonsupervisors, (2) both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit or, (3) both craft and noncraft employees unless a majority of such craft employees vote for inclusion in such unit. All of the powers and duties conferred or imposed upon the division that are necessary for the administration of this subdivision, and not inconsistent with it, are to that extend hereby made applicable. Should formal hearings be required, in the opinion of said division to determine the appropriate unit, it shall have the power to issue subpoenas as described below, and shall determine the rules and regulations for the conduct of such hearing or hearings.

(e) For the purposes of this section the Division of Public Employment Relations shall have the authority and power to hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony or deposition of any person under oath, and in connection therewith, to issue subpoenas duces tecum, and to require the production and examination of any governmental or other books or papers, relating to any matter described above.

(f) In carrying out any of its work under this act, the board may designate one of its members, or an officer of the board to act in its behalf and may delegate to such designee one or more of its duties hereunder and, for such purpose, such designee shall have all the powers hereby conferred upon the board in connection with the discharge of the duty or duties so delegated. In carrying out any of its work under this act, the commission may designate one of its members or an officer of the commission to act on its behalf and may delegate to such designee one or more of its duties hereunder and, for such purpose, such designee shall have all of the powers hereby conferred upon the commission in connection with the discharge of the duty or duties so delegated.

(g) The board and commission may also appoint and designate other persons or groups of persons to act for and on its behalf and may delegate to such persons or groups of persons any and all of the powers conferred upon it by this act so far as it is reasonably necessary to effectuate the purposes of this act. Such persons shall serve without compensation but shall be reimbursed for any necessary expenses.

(h) The personnel of the Division of Public Employment Relations shall include only individuals familiar with the field of public employee-management relations. The commission's determination that a person is familiar in this field shall not be reviewable by any other body.

9. Section 8 of P.L. 1941, chapter 100 (C. 34:13A-8) is amended to read as follows:

C. 34:13A-8 Right to engage in lawful activities.

8. Nothing in this act shall be construed to interfere with, impede or diminish in any way the right of private employees to strike or engage in other lawful concerted activities.

C. 34:13A-8.1 Existing agreements and statutes not affected.

10. Nothing in this act shall be construed to annul or modify, or to preclude the renewal or continuation of any agreement heretofore entered into between any public employer and any employee organization, nor shall any provision hereof annul or modify any statute or statutes of this State.

C. 34:13A-8.2 Filing of contracts.

11. The commission shall collect and maintain a current file of filed contracts in public employment. Public employers shall file with the commission a copy of any contracts it has negotiated with public employee representatives following the consummation of negotiations.

C. 34:13A-8.3 Employee-management relations program.

12. The commission in conjunction with the Institute of Management and Labor of Rutgers, the State University, shall develop and maintain a program for the guidance of public employers in employee-management relations, to provide technical advice to public employers on employee-management programs, to assist in the development of programs for training management personnel in the principles and procedures of consultation, negotiation and the settlement of disputes in the public service, and for the training of management officials in the discharge of their employee-management relations responsibilities in the public interest.

13. Section 11 of P.L. 1941, chapter 100 (C. 34:13A-11) is amended to read as follows:

C. 34:13A-11 Adoption or amendment of rules

11. The board shall have power to adopt, alter, amend or repeal such rules in connection with the voluntary mediation of labor disputes in private employment and the commission shall have the same powers in public employment, as may be necessary for the proper administration and enforcement of the provisions of this act.

14. For the purpose of carrying out the amendatory and supplementary provisions of this act there is hereby appropriated for the use of the commission for the fiscal year 1968-1969, the additional sum of $100,000.00.

15. This act shall take effect July 1, 1968.

Passed September 13, 1968.

Appendix D

SUPREME COURT OF NEW JERSEY
No. A-5—September Term 1973

DUNELLEN BOARD OF EDUCATION,
Plaintiff-Appellant,
and
COMMISSIONER OF EDUCATION OF
NEW JERSEY,
Plaintiff-Intervenor-
Appellant,
v.
DUNELLEN EDUCATION ASSOCIATION
and PUBLIC EMPLOYMENT RELATIONS
COMMISSION,
Defendants-Respondents.

Reargued September 11, 1973. Decided Nov. 20, 1973.

On appeal from the Superior Court, Chancery Division.

Mr. Edward J. Johnson, Jr. argued the cause for the plaintiff-appellant.

Mr. Theodore A. Winard, Assistant Attorney General, argued the cause for the plaintiff-intervenor-appellant (*Mr. George F. Kugler, Jr.*, Attorney General, attorney; *Mr. Stephen Skillman*, Assistant Attorney General, of counsel; *Mr. Michael S. Bokar*, Deputy Attorney General, on the brief).

Mr. Thomas P. Cook argued the cause for the New Jersey School Boards Association, *Amicus Curiae*.

Mr. Abraham L. Friedman argued the cause for the respondent Dunellen Education Association (*Messrs. Rothbard, Harris & Oxfeld*, attorneys; *Mr. Emil Oxfeld*, of counsel).

Mr. John F. Lanson, attorney for the Public Employment Relations Commission, filed a statement on its behalf (*Mr. David A. Wallace* of the New York bar, of counsel).

The opinion of the Court was delivered by JACOBS, J.

The plaintiff Dunellen Board of Education filed a complaint in the Chancery Division seeking to restrain the defendant Dunellen Education Association from proceeding to arbitration of an alleged grievance under the agreement between them for the school year 1971-72. The Public Employment Relations Commission was also named as a defendant but it would appear to be merely a nominal party. The Commissioner of Education was granted leave to intervene as a party plaintiff and the New Jersey School Boards Association was granted leave to participate as *amicus curiae*. The Dunellen Education Association filed an answer and counterclaim in which it sought dismissal of the complaint and, on motion, the Chancery Division entered a summary judgment dismissing the complaint with costs to be taxed against the Dunellen Board of Education. The Board of Education and the Commissioner of Education filed separate notices of appeal to the Appellate Division and, before argument there, we certified on the Commissioner's application. 62 *N.J.* 188 (1973).

The Dunellen Board of Education supervises the K-12 schools within its district and the Dunellen Education Association is the exclusive negotiating representative of the teachers employed by the Board. Pursuant to *N.J.S.A.* 34:13A-1 *et seq.* the Board and the Association entered into a written agreement for the 1971-72 school year which set forth, *inter alia*, salary schedules, extra-duty assignments, various stated rights of the Board, the teachers and the Association, and statements of the negotiation procedure and the grievance procedure. A grievance was defined to be a claim by a teacher or group of teachers "based upon an alleged violation, interpretation, or application, or an administrative decision contrary to the specific provisions of this agreement." A grievance and the procedure relative thereto were expressly declared not to be deemed applicable to: "(a) Any rule of the state board of education; (b) Any rules pertaining to the internal management of the board; (c) A complaint of a nontenure teacher which arises by reason of his not being reemployed; (d) A complaint by any certificated personnel occasioned by appointment to or lack of appointment to retention in or lack of retention in any position for which tenure is either not possible or not required; however said personnel shall have the right of appeal to the Board and all parties agree to abide by the decision made at this level."

The grievance procedure set forth in the agreement contemplated four levels; the first involved oral discussion with the employee's immediate superior; the second involved a further step before the Superintendent of Schools; the third involved a still further step before the Board; and the fourth was provided for in the following terms: "In the event an employee is dissatisfied with the determination of the Board he shall have the right of arbitration pertaining to the interpretation of this contract pursuant to rules and regulations established by the Public Employment Relations Commission under the provisions of Chapter 303, Laws of 1968." (*N.J.S.A.* 34:13A-1 *et seq.*).

Shortly after the agreement between the Board and the Association took effect the then Social Studies Chairman resigned. At that point the Board concluded that it would be educationally desirable to consolidate the Chairmanships of the Social Studies Department and the English Department into a newly created Humanities Chairmanship. It did so and appointed the Chairman of the English Department as Humanities Chairman. There was nothing in the agreement between the Board and the Association which purported to deal with matters such as consolidation of chairmanships and the only specific reference to the Social Studies Chairman and the English Chairman was in a schedule captioned "Extra-Duty Assignments—1971-1972"; that schedule provided that the Social Studies Chairman and the English Chairman would each be paid the sum of $530 for his extra duties as Chairman. The only other reference in the agreement to department chairmen as such was the provision that "Department Chairmen shall be assigned two preparation periods during which they shall perform their departmental duties." This was complied with and is not in issue here.

After the positions were consolidated, the Association filed a grievance which was rejected by the Superintendent and the Board. Thereafter the Association sought arbitration and the Public Employment Relations Commission was requested to appoint an arbitrator. The Commission mailed a proposed list of arbitrators to the Association and the Board and at that point the Board filed its Chancery Division complaint seeking a restraint. The Board's position was that submitting the matter to arbitration would be improper since (1) the agreement did not in anywise restrict its authority to consolidate the Chairmanships of the Social Studies Department and the English Department and to appoint the Chairman of the English Department as Humanities Chairman, (2) if the agreement were construed to restrict such consolidation and appointment it would amount to an illegal and unenforceable delegation of the Board's statutory responsibilities, and (3) the controversy was not one arising under the School Laws of New Jersey and was therefore within the exclusive jurisdiction of the Commissioner of Education.

The Commissioner's position was that he has primary jurisdiction to determine whether the controversy is one arising under the school laws within his exclusive jurisdiction and that arbitration should be stayed pending such administrative determination; on the other hand the *amicus curiae* urged that whether the matter is arbitrable should be determined judicially and suggested that only in rare instances presenting novel issues of school law or educational policy would it be appropriate to refer to the Commissioner. The Education Association's position was that the Commissioner has no function at all in connection with the controversy and that the matter should be permitted to proceed to arbitration. The Chancery Division agreed with the Education Association expressing the view that the dispute was one arising from the contract and that "the expertise of the Commissioner" was not required for its determination. At oral argument before us it was pointed out that after the expiration of the 1971-72 school year the Board reverted to separate Social

Studies and English Department Chairmanships and that consequently the matter at hand may technically be deemed moot. But no one now suggests dismissal for mootness and all are desirous of having some judicial expression on the larger issues for future guidance. Accordingly we shall deal with the merits. See *John F. Kennedy Memorial Hospital v. Heston*, 58 *N.J.* 576, 579 (1971); *Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick*, 48 *N.J.* 94, 109 (1966).

New Jersey's Constitution contains an explicit mandate for legislative maintenance and support of a "thorough and efficient" system of free public schools. *N.J. Const., Art.* 8, *sec.* 4, *para.* 1. In fulfillment of the mandate the Legislature enacted provisions entrusting school supervision and management to local school boards (*N.J.S.A.* 18A:10-1; *N.J.S.A.* 18A:11-1), subject to the supervisory control afforded by the Legislature to the State Board of Education in the Department of Education (*N.J.S.A.* 18A:4-10) and to the Department's chief executive and administrative officer, the State Commissioner of Education (*N.J.S.A.* 18A:4-22, 23). The Commissioner was expressly empowered to hear and determine all controversies arising under the school laws or under the rules of the State Board or the Commissioner (*N.J.S.A.* 18A:6-9) and in a series of decisions this Court reaffirmed the great breadth of the Commissioner's powers. See *Jenkins, et al. v. Twp. of Morris School Dist. and Bd. of Ed.*, 58 *N.J.* 483, 492 (1971); *Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth*, 55 *N.J.* 501, 505 (1970); *Booker v. Board of Education, Plainfield*, 45 *N.J.* 161 173 (1965); *In re Masiello*, 25 *N.J.* 590, 601 (1958).

Among the powers expressly vested by the Legislature in the local school boards was the traditional management power to employ, promote, transfer and dismiss and to adopt appropriate rules in connection therewith, all subject of course to specific statutory provisions. *N.J.S.A.* 18A:11-1; *N.J.S.A.* 18:16-1 *N.J.S.A.* 18A:27-4; *N.J.S.A.* 18A:28-9. In their relations with their employees the boards were clearly to be distinguished from private employers in private industry. The members of the boards were public officials charged with public responsibilities which they could not lawfully "abdicate or bargain away." *Lullo v. Intern. Assoc. of Fire Fighters*, 55 *N.J.* 409, 440 (1970); *cf.* Edwards, "The Emerging Duty to Bargain in the Public Sector," 71 *Mich.L.Rev.* 885, 912 (1973); Note, "Collective Bargaining and the California Public Teacher," 21 *Stan.L.Rev.* 340, 369 (1969). And their employees were public employees who were by law denied the right to strike which in private industry is a lawful incident of the right to collective bargaining. Though the Constitution of 1947 guaranteed the right to collective bargaining in private industry, it provided more narrowly with respect to persons in public employment that they "shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing." *N.J. Const., Art.* 1, *para.* 19; *Delaware River and Bay Auth. v. International Org., etc.*, 45 *N.J.* 138, 145 (1965); *Lullo v. Intern. Assoc. of Fire Fighters, supra*, 55 *N.J.* at 415.

In 1968 the Legislature enacted Chapter 303 known as the "New Jersey Employer-Employee Relations Act." *N.J.S.A.* 34:13A-1 *et seq.* That Act provides in section 7 (*N.J.S.A.* 34:13A-5.3) that a majority representative of public employees in an appropriate unit may act for all employees in the unit and that the majority representative and designated representatives of the public employer shall meet at reasonable times and "negotiate in good faith" with respect to grievances and terms and conditions of employment. The section provides further that when an agreement is reached, the "terms and conditions of employment" shall be embodied in a signed writing. And finally the section provides that public employers shall negotiate written policies setting forth "grievance procedures" which shall be included in the agreement and that "Such grievance procedures may provide for binding arbitration as a means for resolving disputes."

Nowhere in the Act did the Legislature define the phrase "terms and conditions" as used in section 7 nor did it specify what subjects were negotiable and what subjects were outside the sphere of negotiation. In section 10 it did expressly provide that no provision in the act shall "annul or modify any statute or statutes of this State." *N.J.S.A.* 34:13A-8.1. In the light of this provision it is our clear judicial responsibility to give continuing effect to the provisions in our Education Law (Title 18A) without, however, frustrating the goals or terms of the Employer-Employee Relations Act (*N.J.S.A.* 34:13A-1 *et seq.*).

Surely the Legislature, in adopting the very general terms of *L.* 1968, *c.* 303, did not contemplate that the local boards of education would or could abdicate their management responsibilities for the local educational policies or that the State educational authoriities would or could abdicate their management responsibilities for the State educational policies. See *Lullo v. Intern. Assoc. of Fire Fighters, supra,* 55 *N.J.* at 440; *Bd. of Ed., Tp. of Rockaway v. Rockaway Tp. Ed. Ass'n.,* 120 *N.J. Super.* 564, 569 (1972); *Cf. Porcelli v. Titus,* 108 *N.J. Super.* 301, 312 (1969), *certif. denied,* 55 *N.J.* 310 (1970). On the other hand it did contemplate that to the extent that it could fairly be accomplished without any significant interference with management's educational responsibilities, the local boards of education would have the statutory responsibility of negotiating in good faith with representatives of their employees with respect to those matters which intimately and directly affect the work and welfare of their employees.

The lines between the negotiable and the non-negotiable will often be shadowy and the legislative reference to "terms and conditions of employment" without further definition hardly furnishes any dispositive guideline. As the Nebraska Supreme Court noted in *School District of Seward Education Association v. School District of Seward,* 188 *Neb.* 772, 199 *N.W. 2d* 752 (1972), "generally, teacher organizations have given the term 'conditions of employment' an extremely broad meaning, while boards of education have tried to restrict the term to preserve their management prerogatives and policy-making powers." The court noted further that while there were many nebulous areas, "boards should not be required to enter negotiations on matters which are predominantly matters of educational policy, management prerogatives or statutory duties of the board of education." Illustratively, the court expressed the view that matters such as the following would fall exclusively within management's prerogatives and would not be the subject of compulsory negotiation: "The right to hire; to maintain order and efficiency; to schedule work; to control transfers and assignments; to determine what extracurricular activities may be supported or sponsored; and to determine the curriculum, class size, and types of specialists to be employed." 199 N.W.2d at 759. See Dupont and Tobin, "Teacher Negotiations in the Seventies," 12 *Wm. & Mary L.Rev.* 711, 712 n 3 (1971).

In *Joint School District No. 8 v. Wisconsin Emp. Rel. Bd.*, 37 *Wis.2d* 483, 155 *N.W.2d* 78 (1967), the lower tribunals determined that the school calendar was a condition of employment negotiable under Wisconsin's Employment Peace Act § 111.70; that act did not, however, contain any provision comparable to our section 10 (*N.J.S.A.* 34:13A-8.1). *Cf. West's Wis.Stat.Ann.* § 111.91 (*Cum.Supp.* 1973). On appeal the Wisconsin Supreme Court first pointed out that many items and restrictions in the school calendar are established by statutes and to that extent may not be changed by negotiation. But it then held that what was left by the statutes to the school boards in respect to the school calendar was "subject to compulsory discussion and negotiation." The court was careful to point out that the board was under no obligation to forego its own judgment as to what should be the school calendar, noting that:

> . . . under sec. 111.70 the school board need neither surrender its discretion in determining calendar policy nor come to an agreement in the collective-bargaining sense. The board must, however, confer and negotiate and this includes a consideration of the suggestions and reasons of the Teachers. But there is no duty upon the school board to agree against its judgment with the

> suggestions and it is not a forbidden practice for the school board to determine in its own judgment what the school calendar should be even though such course of action rejects the Teachers wishes. The refusal to come to a "settlement" may, of course, place the school board in a position where the Teachers can invoke the fact-finding procedure, but the findings of the fact finder if adverse to the board are not binding upon it. The force of the fact-finding procedure is public opinion, and the legislative process thrives on such enlightenment in a democracy. 155 *N.W.2d* at 83-84.

In *West Hartford Education Association v. De Courcy*, 162 *Conn*. 566, 295 *A.2d* 526 (1972), the Connecticut Supreme Court concluded, from the history and terms of its legislation, that the school calendar was an item which the Connecticut Legislature had excluded from mandatory negotiation. The court recognized that the phrase "conditions of employment" and its purported antithesis "educational policy" did not denote two definite and distinct areas since "Many educational policy decisions make an impact on a teacher's conditions of employment and the converse is equally true" (295 *A.2d* at 534); but nonetheless it readily discharged its case by case responsibility to determine whether any particular controverted subject matter fell within the area of a negotiable condition of employment or whether it was an educational policy determination exclusively for the school board. In passing, the court noted that even where the subject was a mandatory one the board, so long as it negotiated in good faith, did not violate its duty by declining to make a counter proposal or concession. 295 *A.2d* at 538-39; *of. East Hartford Ed.Ass'n. v. East Hartford Bd. of Ed.*, 30 *Conn.Super*. 63, 299 *A.2d* 554, 556 (1972). In *State College Ed. Ass'n. v. Pennsylvania Labor Rel. Bd.*, 306 *A.2d* 404 (1973), the Commonwealth Court of Pennsylvania held that the school calendar was not mandatorily negotiable since it was a matter of "inherent managerial policy" rather than one of the "terms and conditions of employment" within the provisions of its Public Employee Relations Act. 306 *A.2d* at 412-14.

In *Board of Education v. Associated Teachers*, 30 *N.Y.2d* 122, 331 *N.Y.S.2d* 17, 282 *N.E.2d* 109 (1972), the New York Court of Appeals broadly construed its Taylor Law (Civil Serv. Law, art. 14) under which public employers must negotiate in good faith with employee representatives with respect to the terms and conditions of employment. It held, *inter alia*, that provisions for tuition-reimbursement to teachers for graduate courses and reimbursement for job related personal property damage were terms or conditions of employment within the contemplation of the law. And it upheld a contractual provision which contemplated that any tenure teacher who was dismissed for alleged cause could pursue the contractual grievance procedure including ultimate binding arbitration to the total exclusion of any proceeding before the Commissioner of Education. 282 *N.E.2d* at 114; cf. *Legislative Conf. of City U. of N.Y. v. Board of H. Ed.*, 38 *A.D.2d* 478, 330 *N.Y.S.2d* 688, *aff'd*, 31 *N.Y.2d* 926, 340 *N.Y.S.2d* 924 (1972). While this latter holding may conform with the goals of the New York Legislature in enacting the Taylor Law, we are not prepared to say that a comparable result, which would represent a radical departure from settled practices in our education field, would conform with the goals of the New Jersey Legislature.

New Jersey's laws relating to education have had a long-standing provision of specific nature dealing with tenure teachers and their dismissal. *N.J.S.A.* 18A:6-10; *Laba v. Newark Board of Education*, 23 *N.J.* 364, 384 (1957). They have had an equally long-standing provision vesting statutory jurisdiction in the Commissioner of Education over controversies arising under the school laws which have traditionally included dismissal proceedings against tenure teachers. *N.J.S.A.* 18A:6-9; *Laba v. Newark Board of Education, supra*, 23 *N.J.* at 381; *Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, supra*, 48 *N.J.* at 102. When the Employer-Employee Relations Act (*N.J.S.A.* 34:13A-1 *et seq.*) was passed there was no reference to the provisions in the education laws but, as noted earlier in this opinion, there was a blanket statement in section 10 to the effect that no provision in the Employer-Employee

Relations Act shall "annul or modify any statute or statutes of this State." *N.J.S.A.* 34:13A-8.1. In the light of this strong qualifying statement and, absent further clarifying legislation, we are not prepared to consider the general provision in section 7 (*N.J.S.A.* 34:13A-5.3), authorizing the parties to agree on grievance procedures providing for "binding arbitration as a means for resolving disputes," as embodying legislative contemplation that the parties may agree on such arbitration in total replacement of the Commissioner's hearing of dismissal proceedings now required by the express terms of *N.J.S.A.* 18A:6-10 *Cf. Norwalk Teachers Ass'n. v. Board of Education*, 138 *Conn.* 269, 83 *A.2d* 482, 487, 31 *A.L.R. 2d* 1133 (1951).

In the matter at hand we are not concerned with the dismissal of any individual teacher nor are we concerned with the rights of any individual teacher. The Dunellen Board, having concluded that it would be educational, desirable to consolidate the Chairmanships of the Social Studies Department and the English Department into a newly created Humanities Chairmanship, proceeded to do so at a time when no individual teacher would be adversely affected. There was a vacancy in the Chairmanship of the Social Studies Department and the Chairman of the English Department was appointed as Humanities Chairman. This step may have enabled experimental coordination of the two departments to ascertain whether their educational productivity might be increased through measures of joint activity. It was compatible with inter-disciplinary approaches finding recent favor among higher level educators.

In any event, the determination to consolidate was predominantly a matter of educational policy which had no effect, or at most only remote and incidental effect, on the "terms and conditions of employment" contemplated by *N.J.S.A.* 34:13A-5.3. So far as our educational laws are concerned, it is entirely clear that the Board had the statutory responsibility for such educational determinations. See, *e.g.*, *N.J.S.A.* 18A:11-1; *N.J.S.A.* 118A:16-1; *N.J.S.A.* 18A:27-4; *N.J.S.A.* 18A:28-9. And so far as our education laws are concerned, it is equally clear that the Commissioner had an overall responsibility for supervising such educational determinations (*N.J.S.A.* 18A:4-23; *N.J.S.A.* 18A:4-25; *N.J.S.A.* 18A:4-28.3) and for hearing controversies and disputes with respect thereto as "arising under the school laws" (*N.J.S.A.* 18A:6-9).

Whatever may be the conflicting views on other subject matters, it would appear evident that the consolidation of chairmanships represents a matter predominantly of educational policy within management's exclusive prerogatives under the lines drawn in the decisions cited earlier in this opinion. See *School Dist. of Seward Education Association v. School District of Seward, supra,* 188 *Neb.* 772, 199 *N.W.2d* 752; *Joint School District No. 8 v. Wisconsin Emp. Rel.Bd., supra,* 37 *Wis.2d* 483, 155 *N.W.2d* 78; *West Hartford Educational Association v. De Courcy, supra,* 162 *Conn.* 566, 295 *A.2d* 526. Indeed even in states where expansive approaches to the subject of negotiability have been taken, it has generally been acknowledged that creations and terminations of educational positions which, as here, do not affect specific individuals are exclusively board prerogatives. See Doering, "Impasse Issues in Teacher Disputes Submitted to Fact Finding in New York," 27 *Arb.J.* (n.s.) 1, 4 (Mar. 1972).

In some states the legislatures have discharged their responsibilities by enumerating subjects in the educational field which are to be negotiable. *Cf. Rev. Code Wash.Ann.* 28A. 72.030 (1970); *West's Wis. Stat.Ann., supra,* § 111.91; Kilberg, "Appropriate Subjects for Bargaining in Local Government Labor Relations," 30 *Md.L.Rev.* 179 (1970); Moskow & McLennan, "Teacher Strikes and Dispute Settlement Policy," 14 *N.Y.L. Forum* 281 (1968). Under such statutes the judicial course is fairly prescribed leaving only such constitutional issues as may be pertinent. See *City of Biddeford v. Biddeford Teachers Ass'n.,* *Me.* , 304 *A.2d* 387 (1973); *cf. Group Health Insurance of New Jersey v. Howell,* 40 *N.J.* 436 (1963); Wellington and Winter, "The Limits of Collective Bargaining in Public Employment," 78 *Yale L.J.* 1107 (1969). Thus far our Legislature has not chosen to set forth the individual subjects which are to be negotiable and has left the matter to the judiciary for case by case determination as to what are terms and conditions of employment within the meaning of *N.J.S.A.* 34:13A-5.3. But it has at the same time clearly precluded any expansive approach here by directing unequivocally that provisions in existing statutes such as our educational laws shall not be deemed annulled or modified. *N.J.S.A.* 34:13A-8.1.

In the light of all of the foregoing we are satisfied that the Dunellen Board could not legally have agreed to submit to binding arbitration, the soundness or validity of its determination that it would be educationally desirable to consolidate the Chairmanships of the Social Studies Department and the English Department into a newly created Humanities Chairmanship. We are further satisfied that, when nonetheless the issue was actually raised, it should have been presented to the Commissioner of Education for his determination as a dispute arising under the school laws and that, accordingly, the Chancery Division erred in dismissing the Board's action and in entering summary judgment for the Education Association. Strictly this holding relates only to arbitrability but all that has been said earlier in this opinion leads to the conclusion that the consolidation was not a proper subject of either arbitration or mandatory negotiation under *N.J.S.A.* 34:13A-5.3.

The holding that the consolidation was predominantly a matter of educational policy not mandatorily negotiable does not indicate that the Board would not have been well advised to have voluntarily discussed it in timely fashion with the representatives of the teachers. Peaceful relations between the school administration and its teachers is an ever present goal and though the teachers may not be permitted to take over the educational policies entrusted by the statutes to the Board they, as trained professionals, may have much to contribute towards the Board's adoption of sound and suitable educational policies. Before the passage of New Jersey's Employer-Employee Relations

Act (*N.J.S.A.* 34:13A-1 *et seq.*) it was recognized that public employees had the right to be heard through their representatives on their proposals and grievances. The Act significantly broadened that right and, with the goal of peaceful labor relations in mind, created fields of mandatory negotiation. It would seem evident that, when dealing in fields with which the teachers are significantly concerned though outside the fields of mandatory negotiation, the end of peaceful labor relations will generally be furthered by some measure of timely voluntary discussion between the school administration and the representatives of its teachers even though the ultimate decisions are to be made by the Board in the exercise of its exclusive educational prerogatives.

Reversed.

Glossary

This compilation of labor relations terms has been developed as a handy reference for those concerned with the area of public employment. Some of the words have generally understood meanings outside of their usage in the labor field; however, in this glossary only those meanings are given which are peculiar to labor relations.

Agency shop: A type of union security arrangement designed to reimburse the bargaining agent for costs of representing "free riders", i.e., those employees not required to join the union as a condition of continued employment. Normally this fee is equal to union dues, however, in some few cases the fee is a lesser amount.

Arbitration, advisory: An attempt in the public sector to employ the arbitration process without compulsory adherance. Though the arbitrator's award need not be accepted, this process is salutary because of inherent pressure for acceptance of a mutually selected neutral third party's advisement.

Arbitration, binding: A method of resolving a dispute under which the parties to a controversy are bound by the award of a third party. An arbitrator's award will be upheld in court except in extremely unusual cases.

Arbitration, compulsory: Third party dispute settlement required by law or government regulation. Most commonly used to resolve contract disputes with policemen and firemen or other services essential to public health and welfare.

Arbitration, voluntary: Third party settlement where labor and management jointly agree that an issue is to be submitted to arbitration. This may be done on an ad hoc basis or may be pursuant to a collective bargaining agreement making arbitration the terminal point for resolution of a negotiation or grievance dispute.

Authorization card: Statement signed by employee designating a union as authorized to act as his agent in collective bargaining. An employee's signature on an authorization card does not necessarily mean that he is a member of, or has applied for membership in the union, but merely signifies his preference for a particular bargaining organization.

Card check: Comparison of union authorization cards signed by employees against the employer's payroll to ascertain authenticity of employees' signatures.

Certification: Official designation of a labor organization entitled to bargain as exclusive representative of employees in an appropriate bargaining unit. Depending on governing statutes designation as sole and exclusive representative may be made by the employer, an administrative government agency, or a court of competent jurisdiction.

Check-off: An arrangement whereby an employer deducts from the pay of union members in a bargaining unit memberships dues and assessments and transmits these monies to the union.

Closed shop: An arrangement whereby an employer may hire only members of a specified union. With rare exception such an arrangement is prevented as illegal.

Conciliation: An effort by a neutral third party directed toward bringing about a voluntary settlement. In current usage the terms conciliation and mediation are used interchangeably, although technically a "conciliator" plays a less active role than a "mediator" in a dispute.

Confidential employee: One whose responsibilities or knowledge in connection with labor-management issues in collective bargaining, grievance handling, or the content of management discussions would make his membership in the union incompatible with his official duties. Such individuals usually are staff employees reporting to and accountable to those in management responsible for the conduct of labor relations.

Contract: Frequently the term is used interchangeably with "agreement", and is a written, signed document, generally of specified duration, determined as a result of negotiation between an employer and union. The contract sets forth the wages, terms and conditions of employment (wages, hours, fringe benefits, etc.) and the procedure to be used in settling differences that may arise during the term of the contract (grievance procedure).

Demands: Items proposed for incorporation in a negotiated contract. For an initial contract such demands or proposals are usually presented only by the bargaining employee representative, but are frequently presented by both management and union for subsequent contract modifications.

Fact-finding: Generally a quasi-judicial process for presentation of items in dispute to an impartial third party for determination of the "facts" and resolution. The "facts" are not always clear per se, and determination rests the appointed fact-finder who reviews the opposing viewpoints of the contending parties before presenting his written report. It is not uncommon for fact-finders to attempt settlement through mediatory techniques. See Mediation.

Fringe benefits: A general term normally meant to describe financial benefits not subject to income tax which are received by employees. A nonfinancial benefit such as coffee-breaks, wash-up time, etc. is also frequently referred to as a fringe benefit.

Good faith: A term used to describe the attitude and conduct of both parties in the negotiating process. This concept is difficult to define legally or to enforce; however, it implies that the parties honestly and sincerely attempt to reach an agreement.

Impasse: A deadlock in the negotiating process where there is not a meeting of minds since neither side will make further modification of its position.

Job action: Frequently considered a "form" of strike action, it entails a slowing-down or withholding of normally performed services, short of a strike. Its purpose is to force management to acceed to the union's demands.

Managerial or supervisory employee: One who is responsible for the direction of an enterprise by policy determination and/or direction of employee in their job functions.

Maintenance of membership: A form of union security whereby employees who are or elect to become union members on a specified date or thereafter are required to remain members in good standing as a condition of employment for a specified period of time, usually for duration of the contract.

Mediation: The process utilizing a neutral third party whose function is to assist the parties in reconciling their differences by cajoling, probing and offering suggestions for settlement. Though it includes the conciliator's function of bringing the parties together, it is more active in originating or promoting compromises acceptable to the negotiating parties.

Non-professional employee: One whose position and function does not require certification required in teaching, medical and other similar occupations. The term usually is used referring to custodial, maintenance and secretarial personnel.

Professional employee: One whose work is predominantly intellectual and varied in character, requires exercise of discretion and judgment and knowledge of a nature customarily acquired at an institution of higher learning, and is of such character that the output or result accomplished cannot be standardized in relationship to a given period of time. Generally professional employees are organized in separate bargaining units unless they vote to be represented in the same unit as non-professional employees.

Professional sanctions: A technique developed by National Education Association as alternative to the strike, including public declaration of unsatisfactory working conditions; recommendation that members of the profession refuse to accept employment in the area; censure, suspension, or expulsion of members who take jobs in the area; campaign to mobilize public opinion and political action to bring about change.

Recognition: Formal acknowledgement by an employer or a court of competent jurisdiction that a particular organization has the right to represent a group of employees. Exclusive recognition, where permitted, is accorded an organization for a bargaining unit and carries with it the sole right to represent all unit employees, members and non-members, in dealings with management.

Union shop: A form of union security which permits the employer to hire anyone, whether or not he is a member of the union, but requires the new employee to join the union within a specified time and remain a member in good standing. A modified union shop is a variant which excuses some employees (for example, those hired before the union shop agreement was made or those who object on religious grounds) from the union membership requirement.

Unit: Shortened form of "unit appropriate for collective bargaining" which includes all employees considered to share a community of interests which can be served through collective bargaining.

Working conditions: Commonly understood as pertaining to facilities and other areas of environment directly affecting employment. It is normally understood as exclusive of fringe benefits and wages.